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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

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AMERICAN STATE REPORTS.

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AMERICAN STATE REPORTS.
VOL XXXV.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

CROOK v. FIRST NATIONAL BANK OF BARABOO.

[88 WISCONSIN, 81.]

GIFT OF MONEY ON DEPOSIT. — A writing given by a bank to a depositor acknowledging the receipt of four bonds and a certain amount of money in coupons and stating that the former are to be sold and the latter collected and the proceeds placed to the credit of the depositor, is in fact a certificate of deposit, and an indorsement thereon by the depositor addressed to the bank to "please let my nephew have the amount of the within bill," coupled with its delivery so indorsed to such nephew with the intention of giving him the fund in bank operates as a valid gift thereof and justifies the bank in paying it to such donee upon presentation of the writing.

REMEDIES — ELECTION — ESTOPPEL. — An action *ex contractu* to recover money paid by a bank to defendant and received by him to the use of plaintiff, is an election by the latter to affirm the payment by the bank and he is thereby estopped from subsequently asserting as a basis for recovering the money from the bank that such payment was wrongful.

REMEDIES — ELECTION — ESTOPPEL. — When one has a choice between two inconsistent rights or remedies, and deliberately makes his choice, such election becomes conclusive upon him and precludes him from subsequently pursuing the other right or remedy.

ACTION by the plaintiff as administrator of the estate of Lucretia Austin, deceased, to recover the sum of four thousand five hundred and four dollars and seventy cents deposited by her in the defendant bank during her lifetime and alleged to be due and owing to her at the time of her death.

In defense the bank alleged that prior to the death of said Lucretia Austin it received from her certain bonds and coupons with directions from her to sell the bonds and place the proceeds thereof, together with the proceeds of such coupons, to her credit; that the bank followed her directions, and as

the result of such sale and collection the amount placed to her credit was four thousand five hundred and four dollars and seventy cents; that the bank receipted for the bonds and coupons when received as follows:

“IRONTON, Dec. 28, '87.

“Received of Lucretia Austin four 4½ registered bonds, No. 43,981, No. 43,986, No. 43,983, No. 43,982, to be sold and the proceeds placed to her credit in the 1st Nat'l Bank of Baraboo; also for collection \$221 in coupons.

“CHARLES L. SPROAT, Cashier.”

Subsequently to the death of said Lucretia Austin said receipt was presented at the defendant bank by Charles Mitchell bearing the following indorsement:

“IRONTON, Bank Co., Wis.

“*Mr. Chas. L. Sproat, Baraboo, Wis.* — SIR: Please let Chas. Mitchell, my nephew, have the amount of the within bill and oblige,

LUCRETIA AUSTIN.

“Witness, W. H. Mitchell, Catharine Dyson.”

The bank thereupon paid to said Mitchell the sum of four thousand five hundred and four dollars and seventy cents. Lucretia Austin, by the delivery of such receipt with such indorsement thereon, intended to give and did give said sum to said Mitchell.

Defendant also alleged in defense that plaintiff, as administrator of the estate of said Austin, after the payment of said sum to said Mitchell as aforesaid, commenced an action against Mitchell and recovered judgment against him for said sum; that said judgment was for the same demand made in this action against defendant, and that it estopped the plaintiff from maintaining the present action. The court below overruled a demurrer to the answer and plaintiff appealed.

G. Stevens and J. H. McCrory, for the appellant.

R. D. Evans, for the respondent.

PINNEY, J. 1. The receipt set out in evidence given by the bank to Lucretia Austin for the four bonds and two hundred and twenty-one dollars in coupons, the former to be sold and the latter to be collected, and the proceeds to be placed to her credit, was more than a mere receipt. It was of a contractual character, defining the duty of the bank in the premises, and was the sole evidence which Mrs. Austin had to establish her right to the fund produced by the sale of the

bonds and collection of the coupons. The bank, upon such sale and collection, became her debtor for the amount. The receipt was in the nature of a certificate of deposit. Plainly, the bank would not be expected to or be bound to pay over the money without the surrender of its obligation to Mrs. Austin. The receipt was, therefore, potentially the fund itself, without which, in the ordinary course of business, it could not be obtained; and equitably, at least, if not legally, it possessed all the characteristics of a regular certificate of deposit. It represented the money, the proceeds of the bonds and coupons. The answer alleges, in substance, the delivery of this receipt with the indorsement thereon by Mrs. Austin to her nephew, Charles Mitchell, five days after its date, and one day before her death, and that she thereby "intended to give, and did give," the entire fund produced from the bonds and coupons, four thousand five hundred and four dollars and seventy cents, to the said Charles Mitchell, or to him and his brothers and sisters. Construed with reasonable liberality, the answer must be held to allege a gift of this fund due from the bank to Mrs. Austin, under the circumstances above stated, to the party named in the order, and evidence would doubtless be admissible under the answer to show a gift of the fund either *inter vivos* or *causa mortis*.

A gift *inter vivos* must be completed by a delivery of the subject of the gift. A *donatio causa mortis* must be completely executed, so far as delivery is concerned, in the lifetime of the donor, precisely as required in the case of gifts *inter vivos*. A *donatio causa mortis* is a gift absolute in form, made by the donor in anticipation of his speedy death, and intended to take effect and operate as a transfer of title only upon the happening of the donor's death. The gift must be absolute, with the exception of the conditions inherent in its nature, and a delivery of the article donated is a necessary element; but it may be revoked by the donor, and is completely revoked by his recovery from the sickness, or escape from the danger in view of which it was made. And, if not so revoked, the gift may be taken by the administrator of the donor if necessary for the payment of his debts: 3 Pomeroy's Equity Jurisprudence, sec. 1146; *Basket v. Hassell*, 107 U. S. 609, 610; *Henschel v. Maurer*, 69 Wis. 576; 2 Am. St. Rep. 757.

The question presented by the first defense is, whether the delivery of the receipt, indorsed as stated, to Charles Mitchell, with intent to give him the proceeds of bonds and coupons,

could operate as a gift; for whether the gift was one *inter vivos*, or was intended as a *donatio causa mortis*, is not a material question, as it is abundantly shown by the authorities that so far as the subjects which may be disposed of by gift, and the question of delivery are concerned, the law is the same in either case: *Camp's Appeal*, 36 Conn. 92, 93; 4 Am. Rep. 39; *Harris v. Clark*, 8 N. Y. 93, 113; 51 Am. Dec. 352; *Grover v. Grover*, 24 Pick. 261, 264; 35 Am. Dec. 319; *Basket v. Hassell*, 107 U. S. 614. The law favors free and comprehensive power of disposition by an owner of his property, and the rigor of the earlier cases has been materially relaxed, both as to the subjects of such gifts, and as to what will serve as a delivery to make them effectual. This is well illustrated by the cases above cited, in which it is held that the thing given must be delivered, or it must be placed in the power of the donee by delivery to him of the means of obtaining possession. "As to the character of the thing given," says Shaw, C. J., in *Chase v. Redding*, 13 Gray, 418, 420, "the law has undergone some changes. Originally it was limited, with some exactness, to chattels; to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank notes, lottery tickets, notes payable to bearer or to order and indorsed in blank; subsequently it has been extended to bonds and other choses in action in writing represented by a certificate, when the entire equitable interest is assigned; and in the very latest cases on the subject in this commonwealth it has been held that a note not negotiable, or, if negotiable, not indorsed, but delivered, passes with a right to use the name of the administrator of the promisee to collect for the donee's own use." And in *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378, speaking of the extension of the doctrine to include choses in action delivered so as to operate only as a transfer by equitable assignment, or a declaration of trust, Shaw, C. J., also says that "these cases all go on the assumption that a bond or other security is a valid, subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money, by a gift and delivery of the instrument that shows its existence, and affords the means of reducing it to possession."

It has since been repeatedly held, "that a deposit in a savings bank may be the subject of a valid *donatio causa mortis*, as well as of a gift *inter vivos*, and that such a gift may be proved by the delivery of the bank book to the donee, or a

third person for him; that as there can be no manual delivery of the credit which the donor has in the bank, the delivery of the book which represents the deposit, and is the only evidence in the possession of the donor of his contract with the bank, together with an order or assignment, operates as a complete transfer of the existing fund, and is all the delivery of which the subject is capable": *Pierce v. Boston etc. Sav. Bank*, 129 Mass. 430; 37 Am. Rep. 371, and cases cited; *Davis v. Ney*, 125 Mass. 590; 28 Am. Rep. 272; *Hill v. Stevenson*, 63 Me. 367; 18 Am. Rep. 321; *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39. In *Ridden v. Thrall*, 125 N. Y. 572, 577, 578, 21 Am. St. Rep. 758, it was held that the deposit book in a savings bank answers the same purpose as a certificate of deposit in other banks, and that any delivery which transfers to the donee either the legal or equitable title is sufficient to effectuate a gift; and a gift of the moneys due a depositor, by delivery of the deposit book, was upheld, notwithstanding a by-law of the bank, printed in the book, required an order or power of attorney when some person other than the depositor attempted to draw the money; and the donee in that case had no such power, but the court held that he had the same right to enforce payment that he would have had if he had been the donee of any non-negotiable chose in action, or a certificate of deposit or unindorsed note, and could establish his right to payment in such case by any proof showing that he was the absolute legal owner.

It is well settled that in order to constitute a valid assignment of a debt or other chose in action, in equity, no particular form of words is necessary. Any words which show an intention of transferring or appropriating the chose in action to the assignee for a valuable consideration are sufficient; nor is any written instrument required. Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment, and an oral or written declaration may be as effectual as the most formal instrument. An order for or payable out of a particular fund, not only as between the drawer and payee, but as regards the drawee, will so operate, though not accepted by him: 1 Am. & Eng. Ency. of Law, 835, and cases cited *ubi ut supra*. The same is true as to gifts of choses in action, if a delivery, or what in judgment of law amounts to such, takes place. In *Wilson v. Carpenter*, 17 Wis. 516, Cole, J., says: "Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel or chose in ac-

tion; and it is the same whether it be a gift *inter vivos* or *causa mortis*. Without actual delivery the title does not pass"; and he quotes 2 Kent's Commentaries, 439, where the author says: "Delivery in this, as in every other, case must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion, of the property. If the thing given be a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed": *Henschel v. Maurer*, 69 Wis. 576; 2 Am. St. Rep. 757; *Brunn v. Schuett*, 59 Wis. 269; 48 Am. Rep. 499.

In *Elam v. Keen*, 4 Leigh, 333, 26 Am. Dec. 322, an oral gift of a bond in suit, accompanied by a delivery of the attorney's receipt for it, was held a valid gift of the bond, Carr, J., saying: "The bond itself could not be delivered. It was in court, in the custody of the law. The receipt was its representative. . . . As in the case of the key, the delivery of the receipt 'was the true and effectual way of obtaining the use of the subject.' Speaking from my own experience, I should say an attorney requires no better order for the payment of money he has collected on a bond than the receipt he has given for the bond. When he takes this in, with a receipt upon it for the money, he feels himself safe." In this case, superadded to the receipt given by the bank for the bonds and coupons, was an order from the party depositing them for conversion, written upon the receipt itself: *Moore v. Darton*, 4 De Gex & S. 517, 520; *Walsh's Appeal*, 122 Pa. St. 177, 187-190; 9 Am. St. Rep. 83. In *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 172, it is shown that the arbitrary rule requiring an assignment and delivery of the identical thing in order to make a gift of it valid has been abandoned; and the language of the court in *Elam v. Keen*, 4 Leigh, 333, 26 Am. Dec. 322, that "there are many things of which actual manual tradition cannot be made, either from their nature or situation at the time. It is not the intention of the law to take from the owner the power of giving these. It merely requires that he shall do what, under the circumstances, will in reason be equivalent to an actual delivery," was approved;

and it was held that "there is no reason why the intention to give with the actual delivery of the written evidence of the right to the thing, although in the possession of another, under the belief of the donor that it perfects the gift, should not be held to constitute a valid gift *causa mortis*."

But, as already noticed, there was here the written order of the donor on the cashier of the bank, indorsed on the receipt itself; and it is alleged in the answer that by the delivery to Mitchell of these instruments Mrs. Austin intended to give, and did give, the fund in question to Mitchell. The terms of the order it is true are ambiguous, and it is argued that it amounted only to an authority to Mitchell to receive the money as Mrs. Austin's agent. The averment of intention to give and actual gift answer this objection for the purposes of this demurrer, for we think that, as the language of the order is ambiguous, it is entirely clear that parol evidence of what occurred at the time is competent to show that the order and delivery of the receipt were intended by Mrs. Austin to operate as a present gift, and not as a mere authority to receive the money for her use as that the delivery of the receipt and order was accompanied with words of present gift, or that other contemporaneous facts and circumstances justified that conclusion. We therefore hold that the delivery of the receipt, with the order indorsed, with the intention of giving the chose in action—the fund due from the bank—to Mitchell, constituted a valid gift to him of the money due from the bank to plaintiff's intestate.

2. We think that it is a fair inference from the allegations of the second defense that the action in which the plaintiff as administrator recovered judgment against Charles Mitchell and others in the circuit court for Sauk county, for the same money sued for by him in this action, was an action *ex contractu* for money had and received by them to his use, and the question is whether the plaintiff did not thereby affirm that the money was properly paid over by the defendant bank to them or to Charles Mitchell for his use, so as to preclude him from now asserting as a basis of recovery in this action that such payment was wrongful. The rule is universal that where a party has a choice between two inconsistent rights or remedies, and deliberately makes his choice, such election becomes conclusive upon him and precludes him from subsequently adopting the other: *Mariner v. Milwaukee etc. Ry. Co.*, 26 Wis. 89; *Warren v. Landry*, 74 Wis. 144; *Cur-*

tis v. Williamson, L. R. 10 Q. B. Cas. 57; *In re Davison*, L. R. 13 Q. B. Div. 54. If the alleged gift to Mitchell was void or inoperative for any reason, the bank still remained the debtor of Mrs. Austin, and the money it paid to Mitchell was its own money, and the plaintiff had no claim whatever to it. This money so paid could not become the money of the plaintiff except upon his ratification of the act of Mitchell in collecting and of the bank in paying it to him; so that the money he thus received from the bank became and was money received and held by him to and for the use of the plaintiff, and the plaintiff could have no claim to it but by electing to treat it, as he did, by suing for and recovering it, as his money in the hands of the defendants in that action. He could not treat them as his debtors for the money had and received from the bank to his use, and recover against them on that ground, and thereafter sue and recover the same sum from the bank as being still indebted to him. He could not sue and recover in both actions at the same time, nor in succession. His rights and remedies *ex contractu* against Mitchell and others and against the bank were alternative, and not concurrent; and it must follow necessarily that the recovery against Mitchell and others, although not collectible, necessarily extinguished his cause of action in *indebitatus assumpsit* (for it is in that form) against the bank. Numerous authorities were cited by the respondent's counsel sustaining this view of the case, among which is the case of *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479, which was a case where a person entitled to a savings-bank deposit, which had been paid without authority to another person, had a right of action therefor against the bank as debtor, and one against the party so receiving it for money had and received; and it was held that by bringing either action he lost the right to the other, and that a judgment against the party who wrongfully received the money from the bank, although uncollectible, was a bar to an action against the bank. This case seems to have been thoroughly discussed, and has been cited elsewhere with approbation, and was affirmed in *Terry v. Munger*, 121 N. Y. 161, 18 Am. St. Rep. 803; and subsequently the same point was decided in a well-reasoned opinion in *Equitable Life Ass. Soc. v. May*, 82 Ga. 646. The case is the same in principle as where a party who has waived the tort by conversion of personal property by suing in *assumpsit* is held precluded from thereafter maintaining trover against

the defendant's vendee of the same property: *Nield v. Burton*, 49 Mich. 53; *Farwell v. Myers*, 64 Mich. 234. The subject of election between inconsistent remedies and the effect of such election is quite fully considered in *Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 37-39, in which *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479, is cited with approval. It would have been a singular application of legal principles indeed, if the plaintiff had prosecuted both these actions in the same court at the same time, that would permit the plaintiff to recover against Mitchell and others on the ground that they had had and received this money from the bank to his use, and so to obtain judgment against them, and the suit against the bank being called for trial, would allow him to recover the same money against the bank on the ground that it had not been paid to Mitchell to the plaintiff's use, but the bank still was indebted to the plaintiff for it. The remedies pursued by the plaintiff in the two actions are not concurrent, as in the case of several actions against joint trespassers and the like, where both actions proceed upon the same identical facts as a foundation of a recovery, and in which the right involved in either case is entirely consistent with that in the other. It will be found upon close examination that in no case can remedies be regarded as consistent unless predicated upon consistent allegations or grounds of recovery. Here, as already stated, the ground of recovery in the suit against Mitchell and others was that they had received the money from the bank due to the plaintiff to his use, and this is inconsistent with the allegation in this case that the bank still remained indebted to him therefor. The positions are mutually contradictory. The defendant bank may have materially changed its position upon the faith of the assertion and election of the plaintiff in the former action, so that it would be unjust to allow the plaintiff now to retract the claim that Mitchell and others had received the money from the bank to his use, and now insist in this action, as a basis of recovery, that the former allegation is untrue and the bank still remains indebted to him for the money. Both allegations cannot be true: *Warren v. Landry*, 74 Wis. 144; *Morris v. Rexford*, 18 N. Y. 552; *Rodermund v. Clark*, 46 N. Y. 354; *Moller v. Tuska*, 87 N. Y. 166, 169.

We think the remedies pursued by the plaintiff are inconsistent; that, by electing to pursue and charge Mitchell and others for money had and received from the bank, the plain-

tiff elected to affirm the payment made by the bank to Mitchell, and that he cannot now be heard to say that the payment was without authority and that the bank is still indebted to him, as administrator, for the money. The order of the circuit court overruling the plaintiff's demurrer to the defendant's answer must therefore be affirmed.

By the Court. The order appealed from is affirmed.

GIFTS OF DEPOSITS IN BANK — SUFFICIENCY OF: See note to *Sheddy v. Roach*, 25 Am. Rep. 684-687; and note to *Williamson v. Yager*, 34 Am. St. Rep. 219-225. Other cases in the series dealing with this subject are *Conser v. Snowden*, 54 Md. 175; 39 Am. Rep. 368; *Robinson v. King*, 72 Me. 140; 39 Am. Rep. 308; *Pope v. Burlington Sav. Bank*, 56 Vt. 284; 48 Am. Rep. 781; *Pierce v. Boston etc. Sav. Bank*, 129 Mass. 425; 37 Am. Rep. 371; *Marcy v. Amazeen*, 61 N. H. 131; 60 Am. Rep. 320; *Alger v. North End Sav. Bank*, 146 Mass. 418; 4 Am. St. Rep. 331; *Dougherty v. Moore*, 71 Md. 248; 17 Am. St. Rep. 524; *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531; *Walsh's Appeal*, 122 Pa. St. 177; 9 Am. St. Rep. 82; *Drew v. Hagerig*, 81 Me. 231; 10 Am. St. Rep. 255. To constitute a valid gift, there must be a delivery of the property with intent on the donor's part to divest himself of title and possession: *Peck v. Brummagin*, 31 Cal. 440; 89 Am. Dec. 195; *Gardner v. Merritt*, 82 Md. 78; 3 Am. Rep. 145; *In re Bolin*, 136 N. Y. 177; *Barnum v. Reed*, 136 Ill. 288. Any delivery is sufficient which is as complete as the nature of the thing given and the circumstances of the parties permit, and which enables the donee to obtain control of the object which it is intended to transfer: *Noble v. Smith*, 2 Johns. 52; 3 Am. Dec. 399; *Hillebrand v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757; *Gannan etc. Seminary v. Robbins*, 128 Ind. 85; *Devol v. Dye*, 128 Ind. 321. Title to choses in action, such as notes not indorsed and certificates representing money, may pass by delivery: *Westert v. De Witt*, 36 N. Y. 341; 93 Am. Dec. 517; *Second Nat. Bank of Beloit v. Merrill*, 81 Wis. 142; 29 Am. St. Rep. 870 (notes); *Hopkins v. Manchester*, 16 R. I. 668 (notes); *Bingham v. Stage*, 123 Ind. 261 (notes); *Matthews v. Hoagland*, 48 N. J. Eq. 455 (bonds); *Commonwealth v. Crompton*, 137 Pa. St. 138 (shares of railroad stock). Delivery of a mortgage without the mortgage note is not sufficient to constitute a valid gift of the debt: *McHugh v. O'Connor*, 91 Ala. 243. Title will not vest in the donee by the execution of a writing purporting to convey the sum represented by a note: *Gannan etc. Seminary v. Robbins*, 128 Ind. 85; nor by the indorsement on a note of a sum as paid thereon, with the intention on the part of the holder to make a gift thereof: *Gray v. Nelson*, 77 Iowa, 63. For a discussion of the form, etc., of certificates of deposit, see notes to *O'Neill v. Bradford*, 42 Am. Dec. 576-579; *Long v. Straus*, 57 Am. Rep. 97, 98.

ELECTION BETWEEN REMEDIES, EFFECT OF: See notes to *Thomas v. Jestin*, 1 Am. St. Rep. 626-629; *Fowler v. Bowery Sav. Bank*, 10 Am. St. Rep. 487-494. Election between inconsistent rights and remedies cannot be reconsidered, even when no injury has been done by the choice: *Terry v. Munger*, 121 N. Y. 161; 18 Am. St. Rep. 803; nor on the ground that it was due to the mistaken advice of a legal adviser: *O'Bryan v. Glenn*, 91 Tenn. 106; 39 Am. St. Rep. 862. The rule requiring a choice of remedies is applicable only where the remedies available are inconsistent: *Black v. Miller*, 75 Mich. 223; *Crossman v. Universal Rubber Co.*, 127 N. Y. 34; *In re Hobson's Assign-*

ment, 81 Iowa, 392; *Dyckman v. Severson*, 39 Minn. 132. Nor will the fact that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled preclude his exercising the other if he is entitled to do it; *Snow v. Alley*, 156 Mass. 193.

STATE v. CUNNINGHAM.

[88 WISCONSIN, 98.]

CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT.—A state constitutional clause conferring upon the supreme court original jurisdiction to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and other original and remedial writs, is designed to give to that court original jurisdiction of all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people.

CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT.—In matters strictly *publici juris* in which no one citizen has any right or interest other than that which is common to citizens in general, a petition by a private person for leave to commence an action in the supreme court of the state under an original or remedial writ in the name of the state cannot properly be considered until the attorney-general has been requested to move in the matter, and has refused or unreasonably delayed to do so, and in all cases in which an exercise of such original jurisdiction is sought, whether by a private citizen or the attorney-general, leave must first be obtained from the court upon a *prima facie* showing that the case is one calling for the exercise of such jurisdiction.

CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT TO CONTROL ACTS OF STATE OFFICER.—The official acts of the secretary of state in issuing or publishing notices of an election of members of the legislature under an apportionment act alleged to be invalid are purely ministerial. In the exercise of its original jurisdiction the supreme court may control such acts by *mandamus* or injunction, as the exigencies of the cases may require.

CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT—REFUSAL OF ATTORNEY-GENERAL TO BRING SUIT.—The power of the supreme court of the state in the exercise of its original jurisdiction to issue a writ of injunction in a proper case does not depend upon the volition of the attorney-general. After his refusal to bring suit, or to consent thereto, such court may entertain jurisdiction and issue an injunction upon the relation of a private citizen in the name of the state.

CONSTITUTIONAL LAW—VALIDITY OF APPORTIONMENT ACT IS JUDICIAL QUESTION.—In an action to enjoin the secretary of state from issuing or publishing notice of election of members of the legislature under an apportionment act alleged to be invalid, the question of its validity is judicial, not political.

CONSTITUTIONAL LAW—POWER AND DISCRETION OF LEGISLATURE.—In so far as a legislature keeps within the limits of powers in enacting laws its motives cannot be inquired into, and its discretion is not a subject for review in the courts; but whenever and to the extent that it transcends its powers, it is conclusively presumed that it intended to so transcend

them, and parol evidence of good motives or other considerations are not allowed to obviate the effect of such unlawful intent.

CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—EVIDENCE.—In an action to determine the validity of a legislative apportionment statute under a constitutional requirement that such apportionment shall be according to the number of inhabitants in each district, as shown by the last state or federal census, evidence is not admissible to show that in making the apportionment the legislature acted on the theory that certain counties contained more inhabitants than were given them by such census; nor is evidence admissible, in support of such apportionment, to show that one district, with a less population than another, was given the same representation because of the excessive assessed valuation of property therein, and the nature and character of its population and business interests. The legislature has no power to disregard the standard of apportionment as fixed by the constitution.

CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—INEQUALITY.—In an action to test the validity of a legislative apportionment statute, the fact that inequality of representation under it is not greater than under former apportionment acts is irrelevant and immaterial when the language of the state constitution securing equality is plain and unambiguous.

CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—INEQUALITY.—When a legislative apportionment statute contains such a wide and bold departure from a constitutional mandate requiring equality of population in each district that it cannot possibly be justified by the exercise of any judgment or discretion on the part of the legislature enacting it, and evinces an intention to utterly ignore and disregard the constitutional rule in order to promote some other object than a constitutional apportionment, the conclusion is inevitable that the legislature did not exercise its judgment or discretion in accordance with constitutional duty and obligation, and the statute will be declared void.

CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—EQUALITY OF POPULATION.—Under a constitutional provision that the state legislature shall redistrict the members of the senate and assembly according to the number of inhabitants, such districts must be as nearly equal in population as other constitutional requirements will permit, and the requirement as to equality of population in each district is just as applicable to two or more assembly districts in a single community as to an assembly district composed of two or more counties.

CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—POWER OF LEGISLATURE.—The enactment of an apportionment law is an exercise of legislative power, but such power is not absolute and unlimited; on the contrary, it is restricted by constitutional provisions on the subject, and these conditions are absolutely binding upon the legislature, and it has no power, much less discretion, to dispense with any of them.

CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT.—When, under a constitutional provision that the apportionment of the state into senate and assembly districts shall be according to the number of inhabitants, and that the districts are to be bounded by county, precinct, town, or ward lines, and be in as compact form as practicable, it is found difficult to divide a city into districts with an approximate equality in the number of inhabitants, compactness in form of the districts being of less importance, may, to some extent, yield to secure a nearer ap-

proach to equality of representation; but it can never be made to yield in aid of securing inequality in representation.

CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—BASIS OF POPULATION.—A constitutional provision that the legislature, at its first session after the taking of a state or federal census, shall reapportion and redistrict the members of the senate and assembly according to the number of inhabitants, fixes the population of the last census as the basis of apportionment.

CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT.—When a statute apportioning a state into senate and assembly districts complies with constitutional provisions that the assembly districts are to be bounded by county, precinct, town, or ward lines, to consist of contiguous territory, and to be in as compact a form as practicable, and that the senate districts are to be of convenient contiguous territory, no assembly district to be divided in the formation thereof, it is nevertheless void if it does not attempt to comply with the further constitutional requirement that such apportionment shall be according to the number of inhabitants.

CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—INEQUALITY.—A legislative apportionment statute which forms one senate district from two assembly districts having a certain number of inhabitants, and another such district from four assembly districts having more than twice that number of inhabitants, is void as being in violation of constitutional provisions that the members of the senate shall be apportioned according to the inhabitants, if the only impediment to securing equality of representation is the constitutional requirement that senators shall be chosen by single districts of convenient contiguous territory, and no assembly district shall be divided in the formation of a senate district. A like inequality in representation in forming assembly district will, in like manner, render such act void.

ACTION to enjoin the defendant as secretary of state from publishing notice of election of members of the legislature describing the several legislative districts as attempted to be created by the act of July 2, 1892, and also from filing in his office certificates of nomination, and from certifying to the different county clerks in the state the names and description of persons nominated for such legislative offices as specified in such certificates of nomination and for other relief. The complaint alleges the census of 1890 in the state and in the different counties, towns, and wards therein, and in the several senate and assembly districts attempted to be created by the act of July 2, 1892, together with the unit of representation in each as will appear from the statement thereof hereafter appended. The complaint then sets out the act in dispute, alleging it to be formed in disregard and gross violation of the state constitution, and specifically alleges certain senate and assembly districts in which there is a wide departure from the unit of population as fixed by the act, some of such districts containing a gross excess, while others contain a

gross deficit of such unit of population. The complaint then alleges that in several counties of the state specifically named, entitled to more than one member of the assembly, such act attempts to create assembly districts without regard to substantial equality of representation in proportion to population, and that such districts do not consist of contiguous territory, and are not in as compact a form as is practicable, as required by the constitution, and where conformity thereto would secure equality of representation as between such districts. From the record it appears that the relator, Lamb, on August 1, 1892, applied to the attorney-general to move the supreme court for leave to bring the present action in the name of the state against the secretary thereof. Thereafter, on August 18, 1892, the attorney-general refused to bring the suit or to allow it to be commenced in his name. The relator thereafter obtaining leave of the supreme court, brought and prosecuted the action. A demurrer to the complaint was overruled and judgment rendered for the relator as prayed for in the complaint. The act of July 2, 1892, fixed the unit of representation in senate districts at 51,117. And the following statement shows the number of each district, as well as the excess or deficit therein over or under the unit of population as fixed by such act. First, excess 1,022; second, excess 2,333; third, excess 732; fourth, deficit 20,385; fifth, deficit 454; sixth, deficit 4,943; seventh, excess 3,009; eighth, excess 3,289; ninth, excess 11,239; tenth, excess 9,026; eleventh, deficit 5,293; twelfth, deficit 8,740; thirteenth, excess, 9,489; fourteenth, deficit 13,790; fifteenth, excess 3,353; sixteenth, excess 3,858; seventeenth, excess 14,835; eighteenth, deficit 7,029; nineteenth, deficit 1,020; twentieth, deficit 8,628; twenty-first, excess 6,974; twenty-second, deficit 799; twenty-third, deficit 5,713; twenty-fourth, deficit, 5,852; twenty-fifth, deficit 2,736; twenty-sixth, deficit 3,413; twenty-seventh, deficit 7,814; twenty-eighth, excess 8,049; twenty-ninth, 9,892; thirtieth, deficit 13,985; thirty-first, excess 13,002; thirty-second, 6,604; thirty-third, excess 2,442. By the act of July 2, 1892, the unit of representations in the assembly districts was fixed at 16,868 and the excess or deficiency in each district as created by such act is as follows: First, deficit 1,287; second, excess 5,864; third, excess 3,397; fourth, excess 5,249; fifth, deficit 1,925; sixth, excess 5,883; seventh, excess 2,253; eighth, excess 8,243; ninth, excess 6,343; tenth, excess 253; eleventh, deficit 881; twelfth, deficit

229; thirteenth, deficit 715; fourteenth, deficit 1,188; fifteenth, excess 7,921; sixteenth, excess 1,259; seventeenth, deficit 1,071; eighteenth, excess 2,052; nineteenth, excess 8,517; twentieth, excess 5,529; twenty-first, excess 5,796; twenty-second, excess 840; twenty-third, excess 2,368; twenty-fourth, deficit 1,859; twenty-fifth, excess 3,436; twenty-sixth, deficit 1,452; twenty-seventh, excess 3,195; twenty-eighth, deficit 7,403; twenty-ninth, deficit 4,860; thirtieth, deficit 3,400; thirty-first, excess 3,528; thirty-second, deficit 4,555; thirty-third, 6,061; thirty-fourth, excess 493; thirty-fifth, deficit 8,242; thirty-sixth, excess 7,971; thirty-seventh, deficit 4,879; thirty-eighth, excess 4,720; thirty-ninth, deficit 15; fortieth, deficit 84; forty-first, excess 2,999; forty-second, excess 396; forty-third, deficit 3,400; forty-fourth, deficit 2,210; forty-fifth, deficit 900; forty-sixth, excess 3,011; forty-seventh, excess 5,601; forty-eighth, excess 6,837; forty-ninth, excess 3,591; fiftieth, deficit 2,632; fifty-first, deficit 3,100; fifty-second, deficit 5,077; fifty-third, deficit 5,761; fifty-fourth, excess 872; fifty-fifth, excess 2,721; fifty-sixth, deficit 4,146; fifty-seventh, deficit 1,614; fifty-eighth, deficit 4,145; fifty-ninth, deficit 1,731; sixtieth, deficit 465; sixty-first, excess 259; sixty-second, deficit 1,784; sixty-third, deficit 1,619; sixty-fourth, deficit 2,217; sixty-fifth, deficit 4,140; sixty-sixth, deficit 1,246; sixty-seventh, deficit 1,570; sixty-eighth, deficit 1,591; sixty-ninth, deficit 1,137; seventieth, deficit 2,486; seventy-first, deficit 2,893; seventy-second, excess 2,696; seventy-third, excess 1,399; seventy-fourth, excess 2,007; seventy-fifth, deficit 527; seventy-sixth, deficit 1,987; seventy-seventh, deficit 5,240; seventy-eighth, deficit 1,702; seventy-ninth, excess 547; eightieth, deficit 8,610; eighty-first, deficit 4,279; eighty-second, excess 912; eighty-third, deficit 509; eighty-fourth, deficit 3,256; eighty-fifth, deficit 4,350; eighty-sixth, deficit 1,003; eighty-seventh, excess 537; eighty-eighth, excess 1,739; eighty-ninth, excess 3,326; ninetyeth, deficit 566; ninety-first, deficit 4,994; ninety-second, excess 2,249; ninety-third, deficit 4,584; ninety-fourth, excess 543; ninety-fifth, excess 3,515; ninety-sixth, deficit 5,485; ninety-seventh, deficit 3,108; ninety-eighth, excess 253; ninety-ninth, deficit 1,605; one hundredth, deficit 6,032.

George W. Bird, George G. Greene, and John C. Spooner, for the relator.

William F. Vilas, for the respondent.

CASSODAY, J. 1. Counsel for the defendant challenges the jurisdiction of this court in this cause, and supports such contention with much learning and ability. The question of the original jurisdiction or power of this court under section 3, article 7, of the constitution, "to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and other original and remedial writs, and to hear and determine the same," has frequently been considered by this court: *Attorney-General v. Blossom*, 1 Wis. 317; *Attorney-General v. Barstow*, 4 Wis. 567; *State v. Messmore*, 14 Wis. 115; *Cooper v. Mineral Point*, 34 Wis. 181; *Attorney-General v. Chicago etc. Ry. Cos.*, 35 Wis. 425; *Attorney-General v. Eau Claire*, 37 Wis. 400; *State v. Baker*, 38 Wis. 71; *State v. Juneau Co.*, 38 Wis. 554; *State v. Doyle*, 40 Wis. 175; 22 Am. Rep. 692; *Petition of Semler*, 41 Wis. 522; *In re Pierce*, 44 Wis. 411; *State v. St. Croix Boom Corp.*, 60 Wis. 565; *State v. Cunningham*, 81 Wis. 440; 82 Wis. 39. Most, if not all, of these cases were argued with great learning and ability, and then carefully considered by the persons constituting the court at the times they were respectively submitted; and hence must be regarded not only as highly persuasive, but as absolutely binding upon us as authority.

Conscious of the importance of the case at bar, we have diligently sought the guidance of the recorded opinions of the court in the cases cited, so far as applicable, in coming to the conclusions reached, and none more so than the utterances of the late learned and able Chief Justice Ryan. Among the propositions so firmly established as to require no further exposition from this court are those to the effect that the constitutional clause quoted "was designed to give this court original jurisdiction of all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people"; that such prerogative writs, including injunction as a *quasi* prerogative writ, can properly issue only at the suit of the state or the attorney-general in the right of the state; that "in matters strictly *publici juris*, in which no one citizen has any right or interest other than that which is common to citizens in general, a petition by a private person for leave to commence an action in this court in the name of the state cannot properly be considered until the attorney-general has been requested to move in the matter, and has refused or unreasonably delayed to do so"; that in all cases in which an exercise of such original jurisdiction is

sought, whether by such private citizen or the attorney-general, leave must first be obtained from this court upon a *prima facie* showing that the case is one calling for the exercise of such jurisdiction; that the official acts of the secretary of state in issuing or publishing notices of an election of members of the legislature under an apportionment act alleged to be invalid, are purely ministerial; and hence, in the exercise of such original jurisdiction, this court may control the same either by *mandamus* or injunction as the exigencies of the case may require. We do not understand counsel for the defendant to question the correctness of the decision in *State v. Cunningham*, 81 Wis. 440; and hence it is, in effect, conceded that the court has jurisdiction of the subject matter of the case at bar.

The precise objection to the jurisdiction here presented is that its exercise has not been invoked by the attorney-general and hence that the court is powerless to consider the case at all without his consent and co-operation. In *State v. Baker*, 38 Wis. 80, 81, Ryan, C. J., said: "The jurisdiction conferred on this court by the constitution is of informations in the nature of *quo warranto*, as substituted in modern times for the use of the ancient writ itself, and as used when the constitution was framed. This was a prerogative proceeding, *quasi* criminal and *quasi* civil in its character, according to its use, but always classed with criminal informations. . . . The mode of proceeding under this jurisdiction might be regulated by statute, but the jurisdiction itself could not be defeated or abridged. . . . It was undoubtedly competent for the legislature to give a *quasi* civil proceeding in such cases, but not to abolish the *quasi* criminal jurisdiction vested in the court by the constitution. This appears to us to be a matter of substance, not of form." He then referred to the statute expressly authorizing such *quo warranto* "by a private person" in the name of the state when the attorney-general refuses to act, and said: "Before such statute the courts of the state might perhaps, in proper cases, have authorized proceedings in the name of the attorney-general, if that officer wrongfully refused to act and it was necessary to proceed in his name." That action was commenced by a private relator on his own complaint; but the court having become, as stated in the opinion, "embarrassed by the form of the proceedings," the same were, on the suggestion of the court, amended by the attorney-general signing the summons and

information *nunc pro tunc*. Thus it is apparent that the court regarded the want of the attorney-general's signature as a mere defect of form, and not of substance. The learned counsel for the defendant characterizes the last quotation as a mere *obiter dictum*, and it may have been subject to such criticism at the time it was said. However that may be, the proposition received an authoritative sanction from the same learned chief justice, speaking for the whole court, in *State v. Doyle*, 40 Wis. 185 et seq.; 22 Am. Rep. 692. That was an application, made by Drake as relator by his own complaint and by his own attorney in the name of the state, for a *mandamus* to compel the secretary of state to revoke and cancel a license to an insurance company, and the attorney-general appeared as counsel for and defended the secretary. Chief Justice Ryan, speaking for the whole court, there said: "It was stated by the attorney-general that the suit of the relator against the insurance company had been settled; that the relator has no further interest in the question, and therefore no further right to the writ. The fact does not appear of record, but it is immaterial. So far as the private right of the relator is concerned, it is now well settled that this court would not assume original jurisdiction to enforce it." Then, partly quoting from his former opinions, he said: "But in a government like ours public rights of the state and private rights of citizens often meet, and may well be involved in a single litigation. So it may be in the exercise of the original jurisdiction of the court. The prerogative writs can issue only at the suit of the state or the attorney-general in the right of the state. They may go on the relation of a private person, and may involve private right. And the question before us is not upon the private right of the relator, and is independent of the accident that there is a relator in the case. The question on which the exercise of jurisdiction here must turn is whether the subject matter of the writ is one '*quod ad statum reipublicæ pertinet*'; one affecting the sovereignty of the state its franchises or prerogatives. And on this question there appears to us to be no room for doubt. . . . Whether the respondent be right or wrong in his view, and that is for this court and not for him to determine, it is very certain that it concerns the state at large that one of its principal officers executes his office in positive and deliberate disregard of a public statute defining its duties. Such a case, when presented, is one eminently calling for the exercise of our origi-

nal jurisdiction; one, with or without a relator, eminently fit to be presented to the court for adjudication. The writ of *mandamus*, in such a case, eminently serves its function as a prerogative writ."

In Merrill on *Mandamus* (just published) the conflicting decisions upon the question whether a public right can be enforced by a private party as relator are considered, and it is there said that, "the rule refusing the privilege to private parties of obtaining a *mandamus* to enforce public duties is one of discretion, and not of law; and the court will ignore it when the attorney-general refuses to appear to complain of alleged omissions of duty by public officers": Sec. 229. It is there further said, that "the great weight of American authority is to the effect that, where the relief sought is a public matter or a matter of public right, the people at large are the real party, and any citizen is entitled to the writ of *mandamus* to enforce the performance of such public duty": Merrill on *Mandamus*, sec. 230, citing numerous cases. That such is the settled rule in this state is manifest from the quotations made from the opinion of Ryan, C. J., in *State v. Doyle*, 40 Wis. 185; 22 Am. Rep. 692.

The learned counsel for the defendant concedes "that the court of King's Bench always, so far as known, entertained the application for a *mandamus* of any person to compel a public officer, public body, or corporate creature to perform a duty enjoined by the law, notwithstanding the petitioner's injury was not peculiar or different from that suffered by others"; but he insists with much elaboration that such supervisory control is "enforced upon different principles from those maintained by the court of equity in granting preventive relief for the protection of the rights of its suitors." It is true, as argued, that the writ of injunction issues upon the determination of the controversy to enforce the decree entered therein, and hence is generally regarded as merely remedial in its nature; whereas a *mandamus* issues at the commencement of the action, and is to enforce a strictly legal right. This difference confronted the court in the cases against the railroads, and was elaborately considered in the opinion of the court by Chief Justice Ryan: *Attorney-General v. Chicago etc. Ry. Cos.*, 35 Wis. 512-523. Among other things, he there said: "This original jurisdiction is conferred and limited by the power 'to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and other original and remedial

writs, and to hear and determine the same': Const., sec. 3. art 7. The court has many times exercised original jurisdiction in cases of *habeas corpus*, *mandamus*, *quo warranto*, and *certiorari*. This is the first time it has been called upon to assert original jurisdiction of injunction." Then, after pointing out the distinction mentioned, and the inaccuracy in the language of certain former opinions of this court by failing to observe it, he said:

"All the other writs of the group are common-law writs. The writ of injunction, when the constitution was adopted, was exclusively an equitable writ, used only by courts of chancery. As such it was given to this court, implying and carrying with it equitable jurisdiction to employ it. It is therefore plain that the original jurisdiction of this court is both legal and equitable, within certain limits; legal, for the use of the common-law writs; equitable, for the use of the chancery writ. The use of the former must be according to the course of common-law courts; the use of the latter according to the course of courts of equity; in each case subject to statutory modifications of the practice, which do not impair the jurisdiction granted. The common-law writs, as already observed, imply and define the jurisdiction appurtenant to them as jurisdictional writs. It is otherwise with the writ of injunction. Equity has no jurisdictional writs. By the course of courts of equity the jurisdiction must precede the writ. And although the writ is the end of the equitable jurisdiction implied, the scope of the jurisdiction must be sought mainly outside of the writ itself. It can issue only after bill or information filed. And the question still remains, What is the original equitable jurisdiction conferred on the court of bills or informations dependent on the use of the writ?

"The grant of original jurisdiction is one entire thing, given in one general policy, for one general purpose, though it may have many objects and many modes of execution. So it is of the appellate power. So it is of the superintending control. There are three independent and distinct grants of jurisdiction, each compact and congruous in itself; each a uniform group of analogous remedies, though to be exercised in several ways, by several writs, in legal and equitable proceedings, on many objects, in great variety of detail. The constitution wisely, almost necessarily, stopped with the general grants of jurisdiction, carefully distinguished, and left details to practice and experience."

Then, after indicating that the primary and controlling object of the framers of the constitution in giving this court "original jurisdiction over great public interests" was "for greater security," and "for the better and prompter and more authoritative protection of public interests," he said:

"And, plainly recognizing the intention of the constitution to vest in this court one jurisdiction, by several writs, to be put to several uses, for one consistent, congruous, harmonious purpose, we must look at the writ of injunction in the light of that purpose, and seek its use in the kindred uses of the other writs associated with it. *Noscitur a sociis* is an old and safe rule of construction, peculiarly applicable to this consideration Here are several writs of defined and certain application classed with one of vague import. We are to be guided in the application of the uncertain by its certain associates. The joinder of the doubtful writ with the defined writs operates to interpret and restrict its use, so as to be accepted in the sense of its associates; so that it and they may harmonize in their use for the common purpose for which it is manifest that they were all given. And thus, in this use and for this purpose, the constitution puts the writ of injunction to prerogative uses, and makes it a *quasi* prerogative writ."

He then contrasted injunction and *mandamus*, and said: "The latter commands, the former forbids. Where there is nonfeasance, *mandamus* compels duty. Where there is malfeasance, injunction restrains wrong; and so near are the objects of the two writs that there is sometimes doubt which is the proper one; injunction is frequently mandatory, and *mandamus* sometimes operates restraint. . . . And it is very safe to assume that the constitution gives injunction to restrain excess in the same class of cases as it gives *mandamus* to supply defect; the use of the one writ or the other in each case turning solely on the accident of over-action or shortcoming of the defendant. And it may be that where defect and excess meet in a single case the court might meet both, in its discretion, by one of the writs, without being driven to send out both, tied together with red tape, for a single purpose. . . . The prerogative writs proper can issue only at the suit of the state or the attorney-general in the right of the state; and so it must be with the writ of injunction, in its use as a *quasi* prerogative writ. All may go on the relation of a private person, and may involve private right."

The "one entire thing"—the "one general policy"—the "one general purpose" to be accomplished through the "one jurisdiction" by the five several writs grouped together in one clause of the constitution, as mentioned by the learned chief justice, manifestly has reference to "judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberty of its people"; for it is only of such as therein indicated that this court takes original jurisdiction at all. The irresistible logic of the opinion is to the effect that the power to thus issue the five writs thus grouped together for the one purpose named was, by the clause of the constitution quoted, vested in this court absolutely and unconditionally, and is in no way dependent upon the volition of the attorney-general or any other official. This is confirmed by what is said in *State v. Baker*, 38 Wis. 71, quoted above, to the effect that while the legislature might regulate the mode of procedure in such cases, they could not defeat nor abridge the jurisdiction itself; that the appearance in the case by the attorney-general, or his consent, was a mere matter of form and not of substance, and hence could be supplied upon the hearing *nunc pro tunc*. Indeed, it would be a solecism to hold, as this court frequently has held in several of the cases cited, to the effect that the attorney-general has no right or power to commence such an action, much less to prosecute it, without first obtaining leave from this court, and then hold that this court has no power to take jurisdiction in any such case without first obtaining the permission of the attorney-general. This court cannot play fast and loose with the subject of jurisdiction. It either has it absolutely whenever a proper cause is presented, or else it has not got it at all. If it has jurisdiction in such a cause, it is because it has been conferred on the court by the people in their sovereign capacity, in the clause of the organic law quoted. If such jurisdiction is thereby vested in the court, as must be conceded by all, then it would seem to be idle to deny the jurisdiction in such action merely because the attorney-general has refused to co-operate or consent.

In line with the opinions of Chief Justice Ryan, mentioned, Mr. Justice Pinney, in the recent apportionment case, among other things, said: "It would be unprofitable to cite the numerous instances of the exercise of the original jurisdiction of the court in the cases against different administrative officers of the state and county and other officers, relating to the per-

formance of their merely ministerial duties. The cases cited are of both classes—of *mandamus* to compel action, and of injunction to restrain it. . . . It has not been contended, nor can it be maintained, that either of these writs can go to control or restrain any public officer in the exercise of a political or discretionary power”: *State v. Cunningham*, 81 Wis. 493. “Inasmuch as the use of the writ of injunction in the exercise of the original jurisdiction of this court is correlative with the writ of *mandamus*, the former issuing to restrain where the latter compels action, it is plain that this case, as against the respondent, is a proper one for an injunction to restrain unauthorized action by him in a matter where his duties are clearly ministerial and affect the sovereignty, rights, and franchises of the state, and the liberties of the people”: *State v. Cunningham*, 81 Wis. 504.

In Colorado, under a constitutional provision similar to ours, and in a *mandamus* case, where the court approvingly cites several cases from this court, it is said: “Cases of which this court should take original cognizance, directly involving, as in general they must, questions of public right, should be brought in the name of the people. The state or the public being the main party in interest, although individual advantage may be gained, the person instituting the proceeding should appear as relator. It is also eminently fitting that such causes be inaugurated before this court by the attorney-general, or with his consent, or, at least, that the refusal of that officer to act be shown. But we do not declare such consent or refusal absolutely necessary. If the main object of the proceedings is to vindicate a public right, to protect the interest of the state in its sovereign character, to prevent the illegal use of a public franchise as against the people generally, or a considerable portion thereof, or if it be to subserve the public interest in any of the other matters heretofore mentioned, a citizen interested could probably institute the proceeding in the name of the people without consulting the attorney-general”: *Wheeler v. Northern Col. I. Co.*, 9 Col. 248. Substantially the same view of the question is taken by the supreme court of South Dakota, where the same constitutional provision is in force: *Everitt v. Board of County Commrs.* (South Dak., Dec. 3, 1890), 298, and cases there cited. A similar clause in the Michigan constitution (sec. 3, art. 6) omits the word “injunction;” and yet in the recent case under the apportionment of that state a private citizen was the relator,

and the attorney-general appeared for the secretary of state, and it was held that the action was properly brought, even without asking the consent of the attorney-general; and it was held that the conduct of the secretary in giving notices of election could be rightfully restrained by *mandamus*: *Giddings v. Blacker*, 93 Mich. 1.

We have not examined, but it seemed to be conceded on the argument that none of the earlier constitutions contained a provision like the clause in question. It is true, counsel cite English cases to the effect that an action for a nuisance or other matter affecting the people generally the same as the complainant could not be maintained except by and in the name of the attorney-general: *Baines v. Baker*, 1 Amb. 158; *Strickland v. Weldon*, L. R. 28 Ch. Div. 426. But the attorney-general in England occupies a very different position than an attorney-general in a government like ours. He is appointed by patent authorizing him to hold office during the pleasure of the crown; and he is required, with the aid of others, to manage all legal affairs and suits in which the crown is interested. "He is a necessary party to all proceedings affecting the crown, and has extensive powers of control in matters relating to charities, lunatics' estates, criminal prosecutions, etc.": 3 Ency. Brit. 63. In all such matters he acts as the representative and agent of the crown; and, as its servant, he has for centuries enjoyed high prerogative rights. But the office is not as ancient as that of lord high chancellor, whose supremacy as a separate judicial officer and as keeper of the great seal and the king's conscience became established two hundred years before we read of any attorney-general. He enjoys high prerogative rights as well as judicial functions. As chancellor, he has for centuries prescribed his own pleadings, his own practice, and his own writs, including injunction, *habeas corpus*, prohibition, and *ne exeat*; and during the same time he has been a great state officer, taking official rank as the highest civil subject outside of the royal family and the archbishop of Canterbury, a cabinet minister, who habitually secured the sign manual of the king, a member of the privy council, and the presiding officer in the house of lords.

Perhaps there is no better illustration of the English theory of a judiciary dependent, not only upon the will of Parliament, but also upon the will of the crown, as expressed through his lord high chancellor and attorney-general, than

what occurred in respect to the case of *Colt v. Bishop of Coventry*, Hob. 140, case 193, tried during the reign of James I. The action involved a mere civil right between private parties in a court of law, but, in arguing the case, one of the counsel had occasion to deny the power of the king to grant ecclesiastical preferments to be held with a bishopric. The bishop of Winchester happening to be present, complained to the king, who thereupon consulted his attorney-general, Francis Bacon, and "he mentioned a power which, according to the many precedents, the king possessed, of prohibiting the hearing of any cause in which his prerogative was concerned, *rege inconsulto*—i. e., until he should intimate his pleasure on the matter to the judges"; and it was thereupon resolved that a prohibition should issue, and it did accordingly. But the court proceeded with the trial, and entered judgment. Thereupon the king summoned the judges to appear before him and his lord chancellor and attorney-general at Whitehall. Upon their appearance, the king in rage condemned their conduct; whereupon the judges, including Lord Chief Justice Coke, fell upon their knees and prayed for pardon. The king turning, not to his attorney-general, but to his lord chancellor, or the superior officer, said: "I require you, my lord chancellor [Ellesmere], to declare whether I, that am king, or the judges best understand my prerogative, the law, and the oath of a judge." Thereupon the lord chancellor said to the king: "With all humility, your majesty will best be advised in this matter by your majesty's counsel, learned in the law, now standing before you." Bacon responded to the effect that it was for the king, and not for the court, to declare his prerogatives: 1 Campbell's Lives of the Chief Justices, 290–293. Of course, in later years, no such interference would be allowed, even in England.

It might be interesting to inquire whether the higher rank of the lord chancellor in matters prerogative did not give him the discretionary right to modify and change the forms of petitions, pleadings, and writs in his own court, which had been prescribed by himself or his predecessors, without the consent, or even against the protest, of the attorney-general; but it is unnecessary. Wisely, governmental powers in this country are divided between three separate, independent, and co-ordinate departments, each with powers circumscribed and limited by fixed constitutional provisions, ordained and established by the people themselves in their sovereign

capacity; and hence no such despotic interference is permissible.

It was suggested on the argument by the learned counsel for the defendant that this court possessed the combined powers of the court of king's bench and the court of equity presided over by the lord high chancellor. But this court has repeatedly disclaimed for itself and for all subordinate tribunals in the state any and all prerogative powers exercised by the chancellor as keeper of the great seal and as the representative of the king, except in so far as the same may be incidentally connected with powers and jurisdiction which are strictly judicial and conferred upon the judiciary by the constitution itself: *Ruth v. Oberbrunner*, 40 Wis. 238; *Heiss v. Murphey*, 40 Wis. 276; *Dodge v. Williams*, 46 Wis. 70; *Webster v. Morris*, 66 Wis. 391; 57 Am. Rep. 278; *Estate of Hoffen*, 70 Wis. 522; *Will of Fuller*, 75 Wis. 431. The same may be said of every other officer of the state, including the attorney-general.

The constitution provides that "the powers, duties, and compensation of the treasurer and attorney-general shall be prescribed by law": Sec. 3, art. 6. The statute provides that it shall be his duty to appear for the state, and prosecute or defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and all such civil cases as may be sent or remanded by that court to any circuit court; "and whenever requested by the governor or either branch of the legislature to appear for the state, and prosecute or defend in any court or before any officer any cause or matter, civil or criminal, in which the state, or the people thereof, may be in any wise interested." He is also required "to perform all other duties imposed upon him by law": Rev. Stats., sec. 163. There are also several specific duties and powers imposed upon him by the statute, not material here. It will be observed that his duties in this court are thus prescribed directly, while in other courts and before other officers he is required to act "whenever requested by the governor or either branch of the legislature." It was suggested that the clause of the statute quoted gave to the governor a sort of prerogative control over the conduct of the attorney-general; but manifestly such control could not be exercised in opposition to the duties imposed upon the attorney-general by the legislature. Besides, the purpose of the clause of the statute quoted was to impose

otherwise indefinable duties upon the attorney-general, and not to enlarge the powers of the governor. Whatever prerogative powers the governor may have, they can only be such as are incident to his office and vested in him by the constitution. All prerogative powers not authorized by constitutional provision are held in reserve by the people themselves.

We must hold that the refusal of the attorney-general to bring or consent to the bringing of this suit did not prevent this court from rightfully taking jurisdiction of the same upon the relation of a private citizen in the name of the state. This ruling relieves any attorney-general from the charge of preventing a suit for an alleged invasion of the sovereignty of the state or the franchises and liberties of its people. The present attorney-general certainly has the right to exercise the judgment and discretion vested in him by law in the prosecution of suits in this court as well as other courts.

2. It is contended that this is a mere "political action, to effect a political object," and therefore cannot be maintained. We may not understand what is here meant by a "political action." We readily perceive that the determination of an action may have a political effect, and in that sense may effect a political object; but that would not necessarily make the question determined a political, instead of a judicial, question. The determination by the court of the validity of an act of the legislature in organizing a county, town, or municipality, or establishing a new form of town and county government, would undoubtedly have a political effect; but no lawyer, at this date, would contend that the question determined was therefore political and not judicial. In *Attorney-General v. Barstow*, 4 Wis. 567, the late Senator Carpenter contended with much learning and ability that the question involved was purely political, but the court held that it was strictly a judicial question; and the learned counsel for this defendant, with his usual candor, concedes that the court was right; and yet no one will question but what the decision had a political effect. The same was true of the recent case of *Boyd v. Nebraska*, 143 U. S. 135. President John Adams, in the last days of his administration, appointed Marbury to an office, and caused his commission to be made out, signed, sealed, and authenticated by the then secretary of state, but the same was not delivered when the administration expired, and the new secretary, on taking possession of the office, refused to make such delivery. Marbury thereupon applied

to the supreme court of the United States for a *mandamus* to compel such delivery; and it was contended, as it is here, that the question of such delivery was a political matter for the sole determination of the president and his secretary, and in no sense judicial; and although the court held that it had no original jurisdiction in the case, yet Marshall, C. J., in their behalf, declared, in effect, that the question presented was purely judicial, and that the ministerial duty of delivering such commission might be enforced in the inferior court; and the same principle has since been repeatedly sanctioned by the same court: *Marbury v. Madison*, 1 Cranch, 137.

Counsel for the defendant cites that portion of the opinion of the great chief justice in which he disclaims any right in the court to interfere with any of the discretionary powers vested in the executive and his subordinates; and then asks us to consider the language employed, with the word "legislature" put in the place of "executive." We cheerfully do so. In fact, we have already, in the recent apportionment case, disclaimed any and all right to interfere with any of the discretionary powers of the legislature or of any state officer. Mr. Justice Orton, in that case, speaking for the whole court, said: "But it is sufficient that these questions are judicial, and not legislative. The legislature that passed the act is not assailed by this proceeding, nor is the constitutional province of that equal and co-ordinate department of the government invaded. The law itself is the only object of judicial inquiry, and its constitutionality is the only question to be decided": *State v. Cunningham*, 81 Wis. 484. That was done because in that case, as in this, a learned and able member of the bar contended that the question presented was political and not judicial; but, after very careful consideration, we unanimously determined that the question presented was strictly judicial, and in no sense political.

However unpleasant it may be to be again so soon confronted with the same questions, yet the duty cannot be avoided. In the language of Marshall, C. J., "those who fill the judicial department have no discretion in selecting the subjects to be brought before them": *Worcester v. Georgia*, 6 Pet. 541. So whatever course other officials may pursue, this court is under a constitutional mandate to proceed in the spirit of the oath which each member has taken, and perform its duty, which was perhaps never more aptly and tersely expressed than by Marshall, C. J., when he said: "Judicial

power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law": *Osborn v. Bank of U. S.*, 9 Wheat. 866.

In the case at bar the will of the law is the will of the people of the state, as expressed in the organic law of the state. In the last judicial utterance of Chief Justice Taney he said: "Any legislation by Congress beyond the limits of the power delegated would be trespassing upon the rights of the states or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so. For whether an act of Congress is within the limits of its delegated power or not is a judicial question, to be decided by the courts": *Gordon v. United States*, 117 U. S. 705. As already indicated, the state government is divided by the constitution into three separate, independent, and co-ordinate departments—legislative, executive, and judicial. The legislature necessarily precedes each of the others in the making of the laws. The executive department is co-ordinate with it in carrying the laws so made into execution. The judicial department is co-ordinate with both, in that it is required to construe and determine the validity of such laws and such official action. By each of the three departments keeping strictly within the scope of the powers conferred upon it by the constitution, harmony will prevail and the government will be respected. Certainly this court will now, as heretofore, scrupulously refrain from exercising any doubtful power; much less transcending the limit of its powers.

3. In granting the motion to strike out the demurrer to the complaint as frivolous, and for judgment, leave was given to the defendant to present for the consideration of the court an answer upon the merits to the complaint. Such answer has been received and carefully considered. It admits all the material allegations of fact alleged in the complaint. It consists largely of a repetition of statements and suggestions made by counsel upon the argument of the demurrer and motions, and duly considered in disposing of them. Among

other things, it alleges, in effect, that the legislature had the discretionary power to apportion and redistrict the state anew as they did; that in doing so the legislature had given weight and effect to many various considerations, such as that the census of 1890 was inaccurate and did not by several thousand give to the counties of Chippewa, Florence, Forest, Oneida, Langlade, Price, and Taylor the population to which they were respectively entitled; that those several counties were rapidly increasing in population, while such counties as Adams, Waushara, Green Lake, and Marquette were making but little, if any, increase in population; that the fourth senate district of Milwaukee, with only thirty thousand seven hundred and thirty-two inhabitants, was between the Milwaukee river and the lake shore, extending northerly; that it was more or less distinguished from the residue of the city by the nature of its population and the character of its business interests; that the assessed valuation of the property therein exceeds the average of the other senate districts in that city by nearly ten million dollars; that the inequalities of population in the several senate and assembly districts, in the act in question, were not much different than the proposed bill not adopted, nor the several apportionment bills from 1852 to 1887, inclusive.

None of the considerations so alleged are among the requirements prescribed in the constitution. In the recent case, Mr. Justice Pinney, in part quoting from authorities, among other things, said: "If the act done by the state is legal, is not in violation of the constitution, it is quite out of the power of any court to inquire what was the intention of those who enacted the law. . . . The rule is general, with reference to the enactment of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country or existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactment; and we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances, when acting within the limits of its authority": *State v. Cunningham*, 81 Wis. 509. In other words, in so far as the legislature keeps within

the limits of its powers, the motives of its members cannot be inquired into, and its discretion is not a subject for review in the courts; but whenever, and to the extent that, the legislature transcends its powers, it is conclusively presumed that it intended to so transcend the same, and hence parol evidence of good motives or other considerations cannot be allowed to obviate the effect of such unlawful intent.

In the same connection he further said: "An issue of fact cannot be framed and tried by a jury or otherwise with a view of determining by its results the validity of an act of the legislature, but the court is to be confined to the matters of which it may take judicial notice; for otherwise a jury might find on the issue one way to-day and another way to-morrow, and this would beget a distressing condition of uncertainty. . . . It seems to be well established that courts will take judicial notice of a census, whether taken under the authority of the state or United States. . . . The apportionment is to be 'according to the number of inhabitants,' and made at the next session after the state or United States enumeration; and the enumeration is evidently intended as the basis of apportionment. The court will take judicial knowledge of the location, general boundaries, and the juxtaposition of the several counties, towns, and wards mentioned in the act in question, and of matters of common knowledge": *State v. Cunningham*, 81 Wis. 510. These propositions are there supported by the citation of numerous authorities. See, also, *Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89; *Swain v. Comstock*, 18 Wis. 463; *Woodward v. Chicago etc. Ry. Co.*, 21 Wis. 309; *Saukville v. State*, 69 Wis. 178.

Thus it is very obvious, under the rulings of this court in the previous case, that it is not permissible for the defendant here to allege and prove that in making the last apportionment the legislature acted upon the theory that the counties of Chippewa, Florence, Forest, Oneida, Langlade, Price, and Taylor contained twelve thousand seven hundred and seventy-seven more inhabitants than appears from the census of 1890, for to do so would open the door on the other side to prove that the other counties of the state, or some of them, contained less inhabitants than appears from the census. Besides, if proved, it would only show that the legislature purposely disregarded the standard of population thus conclusively fixed by the constitution, and based their action upon other computations, estimates, or considerations. The

same may, in substance, be said in relation to that part of the proposed answer to the effect that the legislature was induced to make the fourth senate district as they did by reason of the excessive wealth therein, and the nature and character of its population and business interests. But, as we shall in another part of this opinion undertake to show, such considerations cannot justify a disregard of the standards of population fixed in the constitution, in making a senate district out of only thirty thousand seven hundred and thirty-two inhabitants, which is twenty thousand three hundred and eighty-five less than the unit, and considerably less than one-half of either the ninth, the seventeenth, or the thirty-first senate district. For the reasons thus substantially stated in the former case we have rejected the proposed answer.

4. This does not exclude from consideration the several former apportionment acts from 1852 to 1887 inclusive, in so far as they may have any legitimate bearing. In fact, they were freely used on the argument of the demurrer and motions by counsel for the defendant, without any objection. In the former case it was strenuously contended that the constitutional provision requiring assembly districts to be bounded by county, town, or ward lines did not prevent the legislature from crossing county lines in the formation of such districts; and it has been said that such views have been entertained by some men especially learned in grammar and philology. To meet such contention, and on the theory that such constitutional requirement might be regarded as ambiguous and doubtful, Mr. Justice Pinney traced the history of the provision: *State v. Cunningham*, 81 Wis. 512-515; and the present chief justice, for the same purpose, considered the former apportionment acts: *State v. Cunningham*, 81 Wis. 523. If such provision of the constitution was thus ambiguous and doubtful, then such history and former apportionments were entitled to their proper weight in the construction given. If, on the contrary, such provision was not ambiguous nor doubtful, then such history and former apportionments were irrelevant, and without any legal significance in a court of law. This must be so, because it is a well-established rule, recognized by all courts, and applicable to constitutions as well as statutes, that where the language of the instrument is plain and unambiguous, whether it be expressed in general or limited terms, the framers thereof should be held to have intended what they have plainly expressed;

and consequently no room is left for construction: Cooley on Constitutional Limitation, 6th ed., 69. It is there said by the learned author that "the meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when the court has occasion to pass upon it. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." Said Marshall, C. J.: "It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation": *Sturges v. Crowninshield*, 4 Wheat. 204; *Hanson v. Eichstaedt*, 69 Wis. 546, and cases there cited. The rule is very tersely stated in *Pike Co. v. Rowland*, 94 Pa. St. 249, where it is said: "Neither the debates nor supposed views of the people, nor the *dictum* of this court, nor all combined, can set aside the plain meaning of a constitutional provision; but if the sense of a clause be doubtful the contemporaneous understanding is material."

"If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted; and neither the courts nor the legislature have the right to add to it or take from it": *Lake Co. v. Rollins*, 130 U. S. 670; *State v. District Board*, 76 Wis. 208, 209. Since a constitution is for the very purpose of preventing any enactment contrary to its provisions, it is very certain that the meaning of language therein which is plain and unambiguous can never be perverted, much less destroyed, by long-continued infringement. Assuming, therefore, for the purposes of this case, that the inequality of representation under the last apportionment act is no greater than under former apportionment acts, still the fact is irrelevant and immaterial to the consideration of this case, unless on examination it is found that the language of the constitution securing such equality is ambiguous and doubtful, and long-continued legislative construction has been given to it.

5. This brings us to the consideration of the validity of the act of July 2, 1892. If this opinion, which has thus far been devoted to preliminary considerations, is unusually long, it is because the defense in this case has been almost wholly devoted to such considerations. The subject of inequality in representation was ably argued and carefully considered in the former case. Mr. Justice Orton, giving the leading opinion

in that case, and speaking for the whole court, among other things said: "But, again, this apportionment act violates and destroys one of the highest and most sacred rights and privileges of the people of this state, guaranteed to them by the ordinance of 1787 and the constitution, and that is 'equal representation in the legislature.' This also is a matter of the highest public interest and concern to give this court jurisdiction in this case. . . . It is proper to say that perfect exactness in the apportionment according to the number of inhabitants is neither required nor possible. But there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion. If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion, and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment, then the conclusion is inevitable that the legislature did not use any judgment or discretion whatever. The above disparity in the number of inhabitants in the legislative districts is so great that it cannot be overlooked as mere careless discrepancies or slight errors in calculation. The differences are too material, great, and glaring, and deprive too many of the people of the state of all representation in the legislature to be allowed to pass as mere errors of judgment. They bear upon their face the intrinsic evidence that no judgment or discretion was exercised, and that they were made intentionally and willfully for some improper purpose, or for some private end, foreign to constitutional duty and obligation. It is not an 'apportionment' in any sense of the word. It is a direct and palpable violation of the constitution": *State v. Cunningham*, 81 Wis. 483, 484.

In the same case, and after referring to the clause of the ordinance of 1787, giving to the inhabitants the benefits of proportionate representation in the legislature, and the organic act of the territory of Wisconsin, providing for an apportionment that should be "as nearly equal as practicable," Mr. Justice Pinney said: "Though obsolete, these acts may be properly regarded as *in pari materia*, and helpful and of historical value in construing sections 3, 4, and 5 of article 4 of the constitution, which came in to take the place of the provisions briefly quoted." Then, after referring

to the language of these constitutional provisions, he further said: "Looking at the scope of these limitations, it is obvious that it was intended to secure in the future that which had been adopted and secured and enjoyed almost from the origin of popular representative government in this country to the time the constitution was adopted, 'proportionate representation,' and apportionment 'as nearly equal as practicable among the several counties for the election of members' of the legislature, as it had existed in Wisconsin since 1836. The provision of section 3 for an apportionment 'according to the number of inhabitants' is the exact equivalent of the provisions of the ordinance of 1787, of a 'proportionate representation of the people in the legislature.'" And then, after referring to the veto by Governor Dewey of the first apportionment bill passed as not being according to the number of inhabitants, and therefore unconstitutional, and other matters, he further said: "The very great disproportion in the number of inhabitants in certain assembly districts mentioned in the opinion of the chief justice must, it seems to me, be regarded as in violation of the mandate of the constitution to apportion members of the assembly according to inhabitants. There is, no doubt, a wide distinction between the exercise of a fair, just, and necessary discretion within the rules of constitutional apportionment, and a gross departure and manifest abandonment and defiance of them; between discretion within certain limits and for certain ends, and an open, obvious, and palpable violation of them": *State v. Cunningham*, 81 Wis. 510-512, 518.

The opinion of the chief justice is devoted to a different question, but in speaking of dividing counties entitled to two or more assemblymen into assembly districts he said: "In making such division, the rules of compactness and numerical equality of population, so far as practicable, are also imposed upon the legislature by the constitution. These latter requirements are largely modified by other constitutional rules, especially the rule which prohibits the dismemberment of towns and wards": *State v. Cunningham*, 81 Wis. 530. And again: "They [the senate districts] must also be as nearly equal in population as other constitutional requirements will permit": *State v. Cunningham*, 81 Wis. 531.

Thus Mr. Justice Orton, in giving the leading opinion of the court in the former case, declared the act unconstitutional and void, because the legislature had not apportioned and

districted anew the members of the senate and assembly according to the number of inhabitants; and that opinion was supplemented by the other opinions therein filed. That decision is here reaffirmed as the law of the state. The requirement that assembly districts must be as nearly equal in population as the other constitutional provisions will permit is just as applicable to two or more assembly districts in a single county as to an assembly district composed of two or more counties. While the act here in question in the main conforms to those requirements of the constitution which prevent equality of representation, yet it almost wholly disregards the only constitutional requirement particularly designed to secure such equality as near as practicable. Hence we find one assembly district with only eight thousand six hundred and twenty-six inhabitants, while another contains twenty-five thousand one hundred and eleven; and one senate district with only thirty thousand seven hundred and thirty-two inhabitants, while another contains sixty-five thousand nine hundred and fifty-two; and there are numerous other irregularities, though less glaring, yet no less repugnant to the constitution, running through the whole act. No attempt has been made to justify these palpable and unnecessary inequalities of representation upon any constitutional basis, save only that of legislative discretion.

Beyond question, the enactment of an apportionment law is an exercise of legislative power, and hence the power to make the same is vested in the senate and assembly. Whatever may have been inferred from what has been said, we believe no lawyer has contended at the bar that such supposed legislative discretion is absolute and unlimited. Had the framers of the constitution intended to give to the legislature absolute and unlimited power in the making of such apportionments, they would simply have required them from time to time to "apportion and district anew the members of the senate and assembly," and stopped right there, or have said nothing on the subject. This court has repeatedly sanctioned the proposition that our state constitution is not so much a grant as a limitation of powers; and hence that the state legislature has authority to exercise any and all legislative powers not delegated to the federal government, nor expressly or by necessary implication prohibited by the national or state constitution: *State v. Forest Co.*, 74 Wis. 615, and cases there cited. Had the constitution, therefore, remained

silent as to the number of senators and assemblymen, the census, the apportionment, and the formation of senate and assembly districts, it is quite obvious that the legislature would have possessed the discretionary powers suggested. It was because the framers of the constitution were unwilling to vest such discretionary and unlimited powers in the legislature that they prescribed specific methods, restrictions, and limitations upon the exercise of such powers. Thus the constitution expressly provides that "the number of the members of the assembly shall never be less than fifty-four nor more than one hundred": Sec. 2, art. 4. Here is a discretion in the legislature, in making an apportionment or otherwise, to fix the number of assemblymen at fifty-four or one hundred, or any number between those figures; but should they attempt to fix the number at only fifty-three or less, or one hundred and one or more, it is very manifest that the enactment would be a simple nullity, for want of power to make it. So by the same section it is provided that "the senate shall consist of a number not more than one-third nor less than one-fourth of the number of the members of the assembly." Here is a discretion left in the legislature, but it is limited to the two fractions named, or some intermediate number, but any attempt to constitute a senate of a greater or less number than thus authorized would obviously be repugnant to the constitution and void.

Leaving out matters not relevant here, and section 4 of the same article, as amended, provides that "the members of the assembly shall be chosen biennially, by single districts, by the qualified electors of the several districts; such districts to be bounded by county, town, or ward lines, to consist of contiguous territory, and be in as compact form as practicable." It is obvious from this that the number of districts must be the same as the number of members; that the qualified electors of each district have power to elect one member, and no more; that neither a town nor a ward can be divided in the formation of an assembly district; so that each town, and the whole of it, must be in some one assembly district, and each ward, and the whole of it, must be in some one assembly district. It was determined in the former case, and is now conceded, that no county line is to be broken in the formation of any assembly district. This section also requires that each assembly district must consist of contiguous territory; that is to say, it cannot be made up of two or

more pieces of detached territory. All admit that these several conditions are absolutely binding upon the legislature, and that that body has no power, much less discretion, to dispense with any one of them. It is conceded that the act in question conforms to these several requirements, but it will be observed that no one of these requirements is calculated to secure or aid in securing the equality of representation; on the contrary, their observance must necessarily, to a limited extent, prevent such equality of representation, so that, unless there are other provisions in the constitution calculated to secure such equality within certain limits, then there is no restriction whatever.

It will be observed that the section quoted speaks of "ward lines," but contains no other reference to cities. From this it is manifest that the framers of the constitution, even at that early day, contemplated that the necessity was likely to arise for dividing up cities by ward lines in the formation of assembly districts, and thus allow smaller factors to enter into the formation of such districts, and to that extent facilitate the equality of representation. Thus, the primary factors of each assembly district are either towns or wards or both; and this is equally true whether the assembly district is wholly within a county, or consists of two or more counties, since each county is subdivided into towns, or towns and wards.

The section quoted also provides that each assembly district must "be in as compact form as practicable." As this clause, to a certain extent, limits legislative discretion, and at the same time and to a certain extent authorizes such discretion, it will be considered in connection with the discretionary powers of the legislature. The constitution provides that the legislature shall, "at their first session after" the prescribed census, either by the state or the United States, "apportion and district anew the members of the senate and assembly, according to the number of inhabitants, excluding Indians not taxed and soldiers and officers of the United States army and navy": Sec. 3, art. 4. Thus it appears that the legislature must not only apportion the members of the senate and assembly "according to the number of inhabitants," but must also district anew the members of the senate and assembly "according to the number of inhabitants." The requirement that such apportionment shall be made at the first session of the legislature after the taking of such census very clearly indicates that the census so taken is

to be the basis of such apportionment; otherwise the apportionment might as well be made the year prior to the taking of such census at the first session of the legislature thereafter. On this point, Mr. Justice Pinney, in the former case, in effect said, as will appear from a quotation herein, that the apportionment must be based upon such prior census or enumeration: *State v. Cunningham*, 81 Wis. 510.

It is here conceded that the total population of the state, according to the census of 1890, was one million six hundred and eighty-six thousand eight hundred and eighty; and that if it were possible to secure exact and equal representation upon the basis of that census, the unit of representation of each assembly district would be sixteen thousand eight hundred and sixty-eight. But, as already indicated, it is impossible to secure exact and equal representation by reason of the constitutional hindrances mentioned; and it is because of such hindrances, and only because of such hindrances, that the legislature, under the constitution, are at liberty to depart from the equality of representation. Hence they are required by that instrument to apportion and district anew the members of the assembly "according to the number of inhabitants," and in doing so the districts are to "be in as compact form as practicable." The thing thereby sought to be secured, and in fact secured, is equality of representation, in so far as it is practically attainable without violating any of the other provisions of the constitution named. And this rule is not only applicable in the formation of a district out of two or more counties, but also to the formation of two or more assembly districts in one county. In apportioning a county into two or more assembly districts there is necessarily a new unit of representation. The act in question provides for six assembly districts, each made up of one or more counties in the northern portion of the state, containing in the aggregate only sixty-seven thousand eight hundred and forty-nine inhabitants, which is less than four times the unit, and when there is no constitutional impediment to their being grouped together into four districts. In the formation of two or more assembly districts in any one county the legislature have the discretionary power to group towns as they may see fit, and to group wards as they may see fit, or to group towns and wards as they may see fit; provided, that in doing so, they do not violate any of the provisions of the constitution mentioned.

Perhaps this may be made to appear more clearly by an

illustration. Dane county contains thirty-five towns and two cities, with an aggregate population, according to the last census, of fifty-nine thousand five hundred and seventy-eight. Of these thirty-five towns, twenty-nine contain less than fifteen hundred inhabitants each, and eight of these contain less than a thousand, and only one exceeds two thousand, and that contains only two thousand three hundred and seventy-nine. The city of Stoughton contains two wards, with each less than fifteen hundred inhabitants. Madison has six wards, and the largest contains only two thousand nine hundred and forty-three inhabitants. The act in question assigned to this county four members. It is simply impossible to apportion and district Dane county anew "according to the number of inhabitants" contained in it, and have a difference in the districts to exceed a minor fraction of adjoining towns, or adjoining towns and wards; but with the city of Madison all in one district, as it is in the act, there is no constitutional reason for any difference in the remaining districts to exceed five hundred, or at most one thousand; and yet, as apportioned under the act, there is a difference of seven thousand two hundred and thirty-three, and this, too, is done at the expense of compactness. Similar views may be regarded as entertained in respect to a large number of counties. In consequence of the very large wards in Milwaukee—eleven of which contain to exceed ten thousand inhabitants each, and one of which contains twenty-two thousand four hundred and sixty-nine—it is more difficult to approximate equality of representation; but it should be done, as far as practicable, under the restrictions mentioned.

Compactness, being of lesser importance, may to some extent, yield in aid of securing a nearer approach to equality of representation; but in some instances, in the act in question, it is made to yield in aid of securing inequality of representation. Thus, in Rock county, there are three assembly districts, and there is a difference in two of them of six thousand two hundred and eighty-five, when it is quite obvious that minor fractions of adjoining towns do not exceed from five hundred to a thousand; and yet the smallest district is entirely surrounded by one of the other districts, thus destroying compactness in the outside district. Counsel is undoubtedly right in saying, in effect, that whether the formation of such hollow district destroys its compactness, within the meaning of the constitution, is simply a question of fact.

According to Mr. Webster, Marshall, C. J., once said from the bench that "a legislature may alter the law, but no power can reverse a fact": 2 Webster's Works, 834.

The constitution also requires that "the legislature shall apportion and district anew the members of the senate . . . according to the number of inhabitants": Sec. 3, art. 4. The only constitutional impediment to the securing of equality of representation in such senate districts is the requirement that "senators shall be chosen by single districts of convenient contiguous territory, . . . and no assembly district shall be divided in the formation of a senate district": Sec. 5, art. 4. The proposed answer alleges that "in the formation of senate districts the legislature is given the discretionary power to compose them of assembly districts containing two, three, or four assembly districts, of such numbers and situation as to the said legislature shall seem convenient and proper with reference to the situation of the inhabitants of such districts, and best for a proper representation of the interests of different parts of the state." This claim goes to the extent of authorizing the legislature, in its discretion, to form a senate district from two of the smaller or four of the larger assembly districts. Here the smallest contains only 8,626 inhabitants, and twice that number would only be 17,252, or only 213 more than one-third of the senate unit; whereas the largest contains 25,111 inhabitants, and four times that number would be nearly twice the senate unit. It is true the act in question does not in any instance show such wide disparity in the population of senate districts; but to here sanction the discretionary power thus claimed is to open the door for its exercise to the maximum by any future legislature. But the present act does go in that direction to the extent of forming one senate district from two assembly districts with an aggregate population of only 30,732, and forming another senate district from four assembly districts, with an aggregate population of 65,952. This is a plain disregard of the constitutional mandate, which requires such apportionment to be made "according to the number of inhabitants."

The vice which seems to run through the act in question is in assuming that the only limit to the discretionary power of the legislature in making such apportionment is the major and minor fractions of such units of representation. Thus, the smallest assembly district above mentioned is only one

hundred and ninety-two above one-half of the assembly unit, and the largest assembly district named above lacks only one hundred and ninety-one of one and a half of the assembly unit; thus asserting the broad discretionary power in the formation of assembly districts of giving to the inhabitants of the one substantially three times the representative power possessed by those of the other, and in the formation of senate districts of giving to the inhabitants of the one a considerable more than double the representative power possessed by the inhabitants of the other. The constitution gives no warrant to any such fictitious standards, and will bear no such latitudinarian construction. Major and minor fractions of population in towns, wards, counties, and assembly districts are, of course, to be considered in making such apportionments, but they are only to be considered along the lines calculated to secure approximate equality in representation. The theory of major and minor fractions of the units of representation cannot excuse or justify a failure to apportion and district anew "according to the number of inhabitants" in so far as practicable, consistently with the other provisions of the constitution mentioned.

It has been said that the court should suggest a plan for such apportionment. But the court now, as heretofore, disclaims any and all legislative functions. Besides, the people in their organic act have themselves devised a plan which is binding upon this court as well as other officials. That plan, however, can never be legitimately worked out by unknown quantities, in some occult science, along the lines of fictitious standards and extraneous considerations; but may very easily, by obeying the imperative constitutional mandate, observing its fixed standards, and resorting to the simple rules of addition, subtraction, and division. Such constitutional mandate and standards cannot be broken down or rendered inoperative on the theory of discretionary power. In speaking of a constitutional provision requiring senators to "be apportioned according to the number of inhabitants," and after mentioning the impossibility of dividing towns, Shepley, J., in *Opinions of the Justices*, 18 Me. 472, 473, said: "And here also it may be said there must exist a discretion to be exercised by the legislature making an apportionment. That power which a legislative body is compelled to exercise by such a moral necessity cannot properly be considered as discretionary. If, however, it be so designated, it

is a discretion like that last named, limited in the same manner and not subject to be abused. There can be no warrant for the exercise of this kind of discretion, if it may be so called, beyond what is required by the case to be provided for. If the legislature has any other discretion, it is necessarily an unlimited one in practice, however it may be attempted to limit it in theory." Then, after speaking of such unlimited discretion, he further said: "It is believed that such is the legitimate and practical tendency of admitting any other discretion than that which arises out of an absolute moral necessity."

"When the constitution defines how a right may be exercised it prohibits the exercise of that right in some other way": *Morris v. Powell*, 125 Ind. 281. The rule is tersely stated by Marshall, C. J., thus: "It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted—that which the words of the grant could not comprehend": *Gibbons v. Ogden*, 9 Wheat. 191. And again the same chief justice said: "If it be a general rule of interpretation, to which all assent, that the exception of a particular thing from general words proves that in the opinion of the lawgivers the thing excepted would be within the general clause had the exception not been made, we know of no reason why this general rule should not be as applicable to the constitution as to other instruments": *Brown v. Maryland*, 12 Wheat. 438. "In expounding the constitution," said Taney, C. J., "every word must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added": *Holmes v. Jennison*, 14 Pet. 571; *State v. Pullman's P. C. Co.*, 64 Wis. 105.

It follows that the constitution requires the legislature to apportion the state into senate and assembly districts "according to the number of inhabitants," as nearly as it can be done consistently with the other provisions of the constitution mentioned. Such constitutional requirements are plain and unambiguous, and hence are not to be regarded as abrogated by any number of legislative violations of them. If, as claimed, there has never been any such equal apportionment in the state, then there certainly has never been any legislative construction of the words quoted; for, in order to give

any effect to such construction, the words construed must be ambiguous, and capable of two or more meanings, one of which the legislature has adopted. Where, however, the words are unambiguous, and the legislature has never undertaken to construe them, but simply disregarded them, their action, though often repeated, cannot be allowed to have the effect of *pro tanto* repealing the constitution.

Judgment has already been entered in accordance with the prayer of the complaint.

MR. JUSTICE WINSLOW dissented from the views expressed by the majority of the court on all of the questions presented by the case, and maintained that the court had no jurisdiction to entertain an action in equity for an injunction on the mere relation of a private citizen to redress a purely public wrong without the presence or consent of the attorney-general of the state. In other words, the matter being exclusively *publici juris*, the case must be brought by the attorney-general on his own relation representing the whole state and the people thereof, and it cannot be maintained on the relation of a private person, citing *Attorney-General v. Chicago etc. Ry. Co.* 35 Wis. 425; *Buck Mountain Coal Co. v. Lehigh C. & N. Co.*, 50 Pa. St. 91; 88 Am. Dec. 534; *Commonwealth v. Burrell*, 7 Pa. St. 34; *State v. Cunningham*, 81 Wis. 440-471, 487. On the question of apportioning the state into senate and assembly districts, the learned judge maintained that a large discretion was vested in the legislature. He said in effect that the constitutional requirement that the apportionment must be made according to population is undoubtedly intended to secure substantial equality of representation, and if it stood alone might mean practically absolute equality in the population of districts. But other requirements equally binding must, to a greater or less degree, necessarily interfere with absolute equality. These other requirements are that in assembly districts no county, town, or ward line shall be broken, that such districts shall consist of contiguous territory and be in as compact form as possible, and, as to senate districts, that no assembly district shall be divided in forming them, and that the territory of each district shall be contiguous and convenient. These requirements render anything approaching absolute numerical equality in either senate or assembly districts impossible.

The constitutional term, "according to population," evidently means as near as practicable, in view of the other requirements mentioned; and there must be a latitude of action in regard to population if the requirement as to compactness is to have any effect, because if the districts are to be divided so as to give the nearest possible approach to equality, compactness must necessarily be disregarded. Manifestly, the legislature must judge what degree of equality of numbers is reasonably practicable, and also of the compactness which is practicable.

"Here, within limits which no one can precisely define or lay down, is a discretion to be exercised, not by this court, but by the legislature. The very fact, also, that the duty of apportionment is imposed on the legislature, a body which in the highest degree is charged with the exercise of judgment and discretion in its acts, is a strong implication that discretion is intended to be exercised. If it were simply a question of addition and division, a board of arithmeticians would answer the purpose far better.

There is, therefore, in my judgment, a discretion here which, with the terms of the constitution alone before us, is evidently quite large; a discretion which any court should hesitate long before interfering with.

"I say it is evident on the face of the constitution itself that a large discretion necessarily exists in the legislature with reference to the matter of population, but we have light on the subject other than that furnished by the words of the constitution. It is a cardinal principle of the law with reference to the construction of statutes, the meaning of which is in any way doubtful that contemporaneous, long-continued, and open construction of the statute in a certain manner by the officers or bodies charged with the duty of executing it is of great weight in judging of the proper construction, and such practical construction is often controlling. This principle has been fully recognized by this court in *Scanlan v. Childs*, 33 Wis. 668, and *Harrington v. Smith*, 28 Wis. 43. That the same principle is applicable to the construction of a constitution, which is simply the highest law of the state, is unquestionable: *Commissioners v. Miller*, 7 Kan. 479; 12 Am. Rep. 425. In judging, therefore, of the latitude or discretion which the legislature is given by the constitution with regard to the population of districts, we are entitled to examine into and consider the construction which was contemporaneously placed upon these constitutional provisions."

Such construction must be regarded as a practical exposition of the constitution by the makers thereof, and as such is of the greatest weight in arriving at that undefined discretion or latitude intended to be allowed as to population of districts. The contemporaneous construction placed upon these constitutional requirements in making the first apportionment after the adoption of the constitution, as well as every legislative apportionment made since, show the exercise of a wide latitude and discretion as to the relative population of districts, and the present apportionment under the act in dispute divides the state into districts far more nearly according to population than any of the previous apportionments.

"Now I do not wish to be misunderstood. I am not claiming that because previous legislatures have violated the constitution the legislature of 1892 may do so with impunity. I fully understand that no prescriptive right to break a constitutional command can be acquired. I am simply claiming that it is apparent that the constitution confers a discretion on the legislature as to the population of districts, a discretion whose limits are undefined, and that in considering the limits of such discretion, contemporaneous, long-continued, and unchallenged construction by the legislature is of great weight. Here we have a practical construction placed upon the constitutional requirement by the constitution makers themselves. We have also forty years of practical construction by the legislature following the constitutional construction unchallenged until now; and I believe it should prevail. If it does prevail, then the law before us is unquestionably valid.

"Considerable stress was laid upon the fact that under the act in question, where counties contained more than one assembly district, the county was not divided as nearly equally in point of population as possible. A considerable number of instances of this kind were commented upon. It was claimed that in such case a new unit should be obtained and the districts made to conform as nearly as practicable to that new unit in population. What I have said as to the legislative discretion applies to a considerable extent upon this question. The limitations of contiguity and compactness interfere with equality of population, and the forty years practical construc-

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"Considerable stress was laid upon the fact that under the act in question, where counties contained more than one assembly district, the county was not divided as nearly equally in point of population as possible. A considerable number of instances of this kind were commented upon. It was claimed that in such case a new unit should be obtained and the districts made to conform as nearly as practicable to that new unit in population. What I have said as to the legislative discretion applies to a considerable extent upon this question. The limitations of contiguity and compactness interfere with equality of population, and the forty years practical construc-

tion is equally emphatic in its tendency to prove that no inflexible rule of this kind is laid down by the constitution. It is very evident also that it would be very undesirable in some cases to divide a county as absolutely even as possible. It is clear to me that the legislative discretion is a wide one as to numbers; that they may consider things such as the community of interest, facility of communication, and the general topography, the rapidity with which population is increasing, and many other things which this court cannot know, and with which it has nothing to do. This court cannot take evidence as to these outside considerations, but I have no doubt of the power of the legislature, in the exercise of its discretion, to consider them. Such considerations were urged in the constitutional convention in making the first apportionment, and it is clear that they were acted upon, and that variations in populations of districts were thus produced. In any event, the differences within county lines are not sufficient, it seems to me, to authorize any court, in view of our constitutional and legislative history, to set aside the law and leave the state with no apportionment."

SUPREME COURT—JURISDICTION OF, TO ISSUE EXTRAORDINARY WRITS: *State v. Nelson County*, 1 N. D. 88, 26 Am. St. Rep. 609, lays down the rule on this subject in much the same words as the principal case. Averments in an application to the supreme court for a writ of *mandamus* that the questions are of great public importance, and are involved in numerous cases, and that a decision of the superior court would not be accepted by either party as final, and that the application is made to save time and expense, do not present a sufficient reason why the application should not be made to the superior court: *Johnson v. Reichert*, 77 Cal. 34.

MANDAMUS CONTROLLING PUBLIC OFFICERS will not be issued unless to compel the performance of purely ministerial duties not involving an official discretion: *State v. Houston*, 40 La. Ann. 393; 8 Am. St. Rep. 532; *County Board of Education v. State Board*, 106 N. C. 81; *State v. Whitesides*, 30 S. C. 579; *State v. Shakespeare*, 41 La. Ann. 156. Private persons will not be permitted to use the writ against public officers except in cases where they have some special interest not possessed by the citizens generally: *Smith v. Mayor*, 81 Mich. 123. *Mandamus* on behalf of the people in their sovereign capacity can be awarded only on the application of the attorney-general or of some district attorney: *People v. Board of Canvassers*, 129 N. Y. 360; but in *mandamus* to enforce a purely public duty, not due the government as such, any private person may move as relator: *State v. Weld*, 39 Minn. 426.

JUDICIAL INVESTIGATION OF THE CONSTITUTIONALITY OF LEGISLATIVE APPORTIONMENTS.—The recent tendency of constitutional law in the United States has been toward the reservation of power by the people and the imposition of restrictions upon legislative action. The legislature, on its part, has doubtless endeavored to counteract this tendency, and in some instances, at least, to thwart the will of the people as expressed in their constitution by evading its provisions and by assuming to yield obedience when in fact consciously violating its spirit. Then the question arises whether the judiciary have any means of determining whether the constitution has been violated, and any power to annul the action of the legislature if such violation is found to exist.

In the judicial decisions of this subject the discretion of the legislature is frequently spoken of, but this term, when employed in this connection, manifestly does not sanction "unrestrained exercise of choice or will." It is the duty of the legislators to carry out the constitution by choosing those means which will best subserve its objects, and the discretion vested in them

is confined, in our judgment, to determining which of several methods will most surely attain those objects. If, in the honest exercise of this discretion, the legislature err, there is rarely or never any power in the judiciary to correct the error. There may be cases, however, in which the action of the legislature so apparently conflicts with the commands of the constitution that it is difficult to conceive that anything but disobedience to them was intended, and yet, even in these cases, the judiciary may hesitate before taking upon themselves authority to question either the correctness of the legislative judgment or the honesty of the legislative action. It must be admitted that this duty must be courageously assumed by the courts, or constitutional restriction upon legislative action must be suffered to fall into that disrespect which must sooner or later come to all commands which there is no power to enforce. Speaking of the power of the courts to declare an apportionment act void, and of the discretion vested in the legislature in respect to such acts, the supreme court of Indiana, in *Parker v. State*, 133 Ind., said:

"It is conceded, however, by the appellants, as we understand them, that there might arise a case in which the courts would have jurisdiction to declare a law apportioning the state for legislative purposes void, as where the general assembly should form districts of counties not contiguous. If the courts have jurisdiction to declare an apportionment act void because it violates one provision of the constitution, we are unable to perceive why they have not such jurisdiction where it violates some other provision. The constitution forbids the formation of senatorial or representative districts of counties not contiguous. It is conceded that an act which violates this provision would be declared void for that reason, and that the courts would have jurisdiction, in a proper case, to adjudicate the matter. If the general assembly should district the state in such a manner as to apportion to the south half ninety representatives, and to the north half ten only, no one would doubt that this would be as plain a violation of the constitution as where it forms districts of counties not contiguous. What good reason can be given for holding that the courts may take jurisdiction in the one case and denying such jurisdiction in the other? It will not do to say that the courts have no jurisdiction in the latter case, because the general assembly has a discretion in the matter of districting the state, for it cannot be successfully maintained that the incumbents of any department of the government have a discretion to disregard the constitution of the state. We think if the courts have jurisdiction in the one case they also have it in the other. We do not mean by this to be understood as holding that the courts have the power to interfere in any matter confided to the discretion of either the legislative or executive department of the government. No court in the Union has maintained more vigorously than this the independence of the three several departments of the state government: *State ex rel. Hovey v. Noble*, 118 Ind. 350; 10 Am. St. Rep. 143; *Hovey v. State*, 127 Ind. 588; 22 Am. St. Rep. 663.

"But it is safe to say that when the acts of either of the three departments are in violation of the constitution of the state such acts are not within the discretion confided to that department. That the general assembly has some discretion in the matter of districting the state for legislative purposes there can be no doubt, and there can be as little doubt that where it acts within this discretion the courts have no power to interfere. If it should be found, upon examination, that the several acts of the general assembly, of which complaint is made in this action, are within the discretion confided to the legislative department of the state, that will be the

end of this investigation; for we have no power, much less the inclination, to interfere with such discretion; nor are we able to perceive how such cases as that of *Smith v. Myers*, 109 Ind. 1, 58 Am. Rep. 375, and *Hovey v. State*, 127 Ind. 588, 22 Am. St. Rep. 663, can affect the question now under consideration. If this were a case in which the appellee sought to compel the general assembly to district the state in a particular manner, or even to act at all in any manner whatever, then this line of authorities would be applicable; and, by reason of the independence of the several departments of the state government, we would hold, without hesitation, that we had no jurisdiction over the matter. The courts have no power to district the state for legislative purposes. That duty belongs to another department. The most the courts can do is, in a proper case, to pass upon the validity of a law enacted for that purpose, and, if such law is found to be in conflict with the constitution of the state, declare it invalid, leaving the legislature free to enact one that does conform to the constitution. This is quite a different thing, we think, from undertaking to control legislative action or discretion. Our opinion is that the question presented by the record in this case is judicial and not political."

Perhaps some of the courts have evaded the responsibility resting upon them, by assuming in the face of the truth that the legislature must have undertaken some investigation and carried it out in good faith and become conscientiously convinced of the existence of the facts necessary to sustain its action. The constitution of Missouri provides that, "The general assembly of the state shall have no power to establish criminal courts except in counties having a population exceeding fifty thousand." An act having been passed in 1889 establishing a court for the county of Greene, it was shown by the census of 1890 that the population of that county was only forty-eight thousand nine hundred and sixteen, and its population at the taking of the preceding census was but twenty-eight thousand eight hundred and one, and there was also other evidence offered tending to prove that its population had never been the number required by the constitution to authorize the establishment of a criminal court. In this case the population, as shown by the census of 1890, was so little below the number authorizing the creation of the court that there was, perhaps, a possibility that in the preceding year, when the statute was enacted, the requisite number of inhabitants were in the county, or, at least, that the legislature might reasonably have believed them to be there, and therefore have acted without any intention of violating the constitution. The reasoning of the court, however, indicated that it did not consider itself at liberty to question the legislative action. It said: "The minds and consciences of those constituting the legislative department of this state, when called upon to act on this law under the solemn sanctions of their oath of office, were charged by the constitution with the duty of inquiring into and determining this question of fact. The only presumption we can indulge in regard to their action is, that they did their duty, duly inquired into, and, upon evidence satisfactory to themselves, ascertained that Greene county had at the time the population required by the constitution. What that evidence was we do not know, have no way of ascertaining, and are not at liberty to inquire. The very nature of the constitutional duties they were called upon to perform required the determination of that question of fact before that duty was performed. We must assume that the legislative discretion was properly exercised, that the fact required to be found under the constitution that Greene county had a population exceeding

fifty thousand was properly found, as declared on the face of the statute:" *Ex parte Rensfro*, 112 Mo. 591.

In the case from the opinion of which we have just quoted, the constitution did not declare that the number of inhabitants of the county should be ascertained by the census, nor by any other special mode, and while the census taken soon after the passage of the statute in question did not show that the county contained the requisite population, still it might well be that the estimation of the legislature was correct and the census incorrect, and therefore that in the enactment of the statute the constitution was not violated. If the question is one of fact and the constitution does not declare that it shall be ascertained by any particular test, such as consulting the census and the like, the courts are, except in extreme cases, without the means of ascertaining whether the constitution has been disobeyed or not. If, in order to test the constitutionality of a statute, it is necessary to take evidence to determine what is the actual population of a county or district, or to settle any other question of fact, so that different juries or different courts performing the function of juries may reach different verdicts or findings, then, we apprehend, that the courts will not undertake to review the legislative finding, expressed or implied, involved in the passage of the statute. Furthermore, the constitution cannot ordinarily be complied with by making a mere mathematical test. It may exact respect for the boundary lines of counties, wards, or other districts, so that the legislature when it comes to act may find it proper or necessary to impose some inequality with respect to the number of inhabitants in order that the district formed shall not violate the constitution in other respects. Whenever the legislature, though it clearly has not made an apportionment equal as to population, may reasonably be supposed to have brought about this inequality in attempting to comply with some other commandment of the constitution, the courts will doubtless not review, nor declare void, its action. In other words, when a discretion has been reposed in the legislature and it can on any reasonable hypothesis be believed not to have intentionally abused that discretion by seeking objects which it is forbidden to seek, in few, if any, instances can the legislative judgment be questioned and its acts adjudged void: *People v. Rice*, 135 N. Y. 473; *Baird v. Board of Supervisors*, 138 N. Y. 95.

In some instances the legislative discretion to be exercised in the apportionment of senatorial and assembly districts has been confided to members of the board of supervisors. This delegation of legislative power does not change the character of the authority exercised, nor, in our judgment, make it more or less subject to judicial examination than if it were retained and exercised by the assembly and house of representatives. Though the supervisors are not to be controlled wholly by the arithmetical process, but are required not to divide towns and also to make the districts of convenient and contiguous territory, their discretion is not absolute, nor is it exempt from review by the courts. It will be presumed that the board acted under pure motives and that their action was correct, and the proof that there is some inequality in the population of the several districts does not necessarily rebut this presumption. "Every trifling deviation from the standard of population does not justify or warrant an application to the court for redress. It must be a grave, palpable, and unreasonable deviation from the standard, so that, when the facts are presented, argument would not be necessary to convince a fair man that very great and wholly unnecessary inequality had been intentionally provided for." Such being the case, the apportionment will be declared void by the courts, and the proper officers will, by

mandate, be compelled to proceed to make a new apportionment: *Baird v. Board of Supervisors*, 138 N. Y. 95, 114.

The same result must follow an apportionment made directly by the legislature, when its repugnancy to the constitution can be ascertained by the courts. It has sometimes been said that the courts can act only upon matters which fall within their judicial knowledge, and that therefore they cannot form and try any issue of fact upon this subject: *State v. Cunningham*, 81 Wis. 509. This is probably true, but up to the present time, so far as we are aware, there has been no claim that the courts can act in any other case, and no necessity for determining whether they may take evidence respecting facts not conceded by the pleadings nor within judicial knowledge. Constitutions directing apportionments to be made of assembly and senatorial districts have usually required such apportionment to be based either upon the national census or upon some enumeration of the population to be previously made by the state. Of such census or enumeration the courts take judicial notice and they, of course, have like knowledge of the legal subdivisions of the state into counties and of the boundaries of such counties, and it is, therefore, generally possible to know, without taking testimony, the difference between the population of the various districts, and the courts have only been required to decide whether the inequality in population could be justified by any other consideration upon which it was proper for the legislature to act. In every instance in which the inequality has been so great that proper considerations could not have justified it, the courts have pronounced the apportionment invalid: *Ballentine v. Willey*, 2 Idaho, 1209; *State v. Cunningham*, 81 Wis. 440; 83 Wis. 90; 35 Am. St. Rep. 27; *Board of Supervisors v. Blacker*, 92 Mich. 638; *Giddings v. Blacker*, 93 Mich. 1. "It is proper to say that perfect exactness in an apportionment according to the number of inhabitants is neither required nor possible. But there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion. If there is such a wide and bold departure from this constitutional rule that it cannot be possibly justified by the exercise of any judgment or discretion and that evinces an intention on the part of the legislature to boldly ignore and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment then the conclusion is inevitable, that the legislature did not use any judgment or discretion whatever": *State v. Cunningham*, 81 Wis. 440, 484.

In perhaps every instance in which an apportionment act has been assailed for manifest inequality, the attention of the court has been called to previous statutes upon the same subject, for the purpose of proving that inequality has usually been the vice of such statutes, and of arguing that the contemporaneous construction of constitutions forbidding inequality has been in favor of sanctioning inequality, and the courts have been asked to adopt such construction as binding on them. The truth is that the legislative action in these cases ordinarily deserves to be ranked not as a construction of constitutional law but as a manifestation of political bias and depravity. In this light it was doubtless regarded by a court which said: "We have been asked to examine and compare the act now under consideration with other acts of the general assembly, dividing the state into districts for legislative purposes, which we have cheerfully done. Such examination only serves to confirm a well-known historical fact, and that is, that as each party succeeded to power in the state it endeavored to so district it for legislative purposes as to retain that power, and that, too, very often in total disregard

of the constitution of the state demanding equality in representation. The rule of practical construction is of no value when it is plain that the practice has been in open violation of the instrument which the court is called upon to construe": *Parker v. State*, 133 Ind. 199.

STEWART v. STEWART.

[88 WISCONSIN, 364.]

JUDGMENT NULLIFYING DEED—CONCLUSIVENESS.—A judgment of a court of competent jurisdiction setting aside and nullifying a conveyance of land and establishing the relation of the parties to each other, is conclusive upon them, and they are thereby estopped from subsequently asserting any title or claim of title to the premises in question under such conveyance, or denying their relation to each other as thus established.

JUDGMENT NULLIFYING DEED AND ESTABLISHING COTENANCY—EFFECT OF. A judgment against a person in possession of land declaring the deed under which he holds to be void and that he is a tenant in common with the other parties to the suit, interrupts and destroys any adverse possession he may have had against his cotenants and restores the seisin to all of them, and the subsequent silent possession of such person claiming under the same deed accompanied by no act amounting to an ouster, will not constitute such adverse possession against the other cotenants, as will vest title by the statute of limitations.

ADVERSE POSSESSION—INTERRUPTION.—Any substantial interruption of an adverse possession before the lapse of the period required to constitute the statutory bar restores the seisin of the rightful owners of the land, and in order to give rise to the statutory bar thereafter a new entry and disseisin are necessary. The running of the statute may be interrupted if the possession ceases to be adverse, although possession in fact continues.

COTENANCY—ADVERSE POSSESSION—BURDEN OF PROOF.—As between cotenants the burden is upon the one claiming to hold adversely to establish such a state of facts, known to his cotenant, as will amount to an adverse claim of title. Notorious possession alone is not sufficient.

JUDGMENT NULLIFYING DEED AND ESTABLISHING COTENANCY—IMPROVEMENTS BY COTENANT—LACHES.—When after the rendition of judgment against a party in possession of land declaring the deed under which he holds to be void, and that the parties to the suit are tenants in common, such party continues in possession, but without claiming to hold adversely to his cotenants except by virtue of such deed, his possession is not adverse, and if he places improvements on the land he does so at his risk, without any right to maintain that his cotenants are guilty of laches in allowing him to erect such improvements.

EJECTMENT by one of the heirs of Alexander Stewart deceased against Archibald Stewart also one of such heirs. The opinion states the facts. The court below found in favor of defendant that plaintiff's claim of title was barred by adverse possession under the statute of limitations; that he had been guilty of laches and had no claim on improvements, erected

on the land by defendant. Judgment for defendant, and plaintiff appealed.

Carney, Clasen, and Walsh, and Bashford, O'Connor, and Polleys, for the appellant.

E. Merton and T. E. Ryan, for the respondent.

PINNEY, J. The judgment in the former case of *Stewart v. Stewart*, 50 Wis. 445, which was put in evidence by the plaintiff, is conclusive upon the title to the tract of land in dispute. All the heirs at law of Alexander Stewart, through and under whom both parties claim title, were the parties to that action. The plaintiff in this action and those of his coheirs under whom he claims were some of the plaintiffs, and the defendant in this action and James A. Stewart, who conveyed, pending that suit, to him his claim under the deed of February 3, 1860, from Alexander Stewart to Archibald A. Stewart and James A. Stewart, were defendants. This judgment is clearly final and conclusive as to all matters adjudged by it: *Allie v. Schmitz*, 17 Wis. 169. The proposition is elementary, indeed, and it is not necessary to cite authorities to support it. The judgment established the utter invalidity of the deed of February 3, 1860, as a source or foundation of title or claim of title. From thenceforth, as to the parties to it and those in privity with them, it was as if it had never existed, and each and all of the parties were forever after the rendition of this judgment estopped from asserting any title or claim of title to the premises in question under it, and destroyed it root and branch for any and every purpose whatever. Any other view would be utterly inconsistent with the conclusive effect of judgments as to matters actually determined by them. In the case of *Hoyt v. Jones*, 31 Wis. 389, 400, it was said by Dixon, C. J., that "the effect of the judgment of a court of competent jurisdiction, setting aside and nullifying a conveyance of record of land, is no less than if such record was actually effaced from the register's books. It becomes as if no such conveyance had ever been executed or ever been recorded."

The judgment in question was also conclusive on the *status* or relation of the parties to each other, and their rights in and to the tract of land in question, and conclusively established the fact that the parties to it were tenants in common of the premises, and that all their rights and relations to this tract of land in respect to each other were then such as grow

out of that relation, and of necessity put an end to the contention that the defendants in that action then held the same adversely under claim of title exclusive of any other right, founding such claim upon the alleged written instrument relied on, namely, the deed of February 3, 1860. This made the defendant's claim of title necessarily, and his possession under it, in law, what it declared it to be in fact—that of a tenant in common with the other parties named in the decree; for, this deed aside, the defendant in this action, as well as James A. Stewart, who conveyed to him during the pendency of the former action, were also heirs at law of the said Alexander Stewart, deceased, with the rights of such as established by the judgment after their claim to the entirety had been declared void. And if their possession had been adverse up to that time, the judgment put an end to and interrupted its adverse character, and established the rights of all parties to the land equally as heirs of Alexander Stewart, deceased, and restored the seisin of all of them alike if it had been interrupted as to any, so that the possession of the defendant, if adverse prior to the judgment, cannot be relied on or tacked to his subsequent adverse possession, if such it has been, in order to make out his defense.

Any substantial interruption of an adverse possession before the lapse of the period required to constitute the statutory bar restores the seisin of the rightful owners of the legal title, and, in order to give rise to the statutory bar thereafter, a new entry and disseisin is necessary: *Wood on Limitation of Actions*, 574, 576; *Haag v. Delorme*, 30 Wis. 594. The running of the statute may be interrupted if the possession ceases to be adverse, although possession in fact continues. If the defendant had made a quitclaim to his coheirs of all his right, title, and interest in the premises acquired under the particular deeds under which he claims, there can be no question but that his continued possession would, in such a case as this, be considered as under and in subordination to the legal title of all the heirs as tenants in common, and not adverse and under claim of title founded on those deeds. After a valid execution sale of land and conveyance by the sheriff, the continued possession of the defendant in the execution is not adverse, but in subordination to the rights of the purchaser at the sale: *Swift v. Agnes*, 33 Wis. 228, 241.

The judgment in question operated and had in law the effect of a release by the defendant of all right, title, and in-

terest acquired by him under the deeds upon which he now seeks to found his defense under the ten years statute of limitations; and it estopped him and disabled him in law from making any claim of title thereafter founded on those deeds: *Gower v. Quinlan*, 40 Mich. 572; *Hoyt v. Jones*, 31 Wis. 389, 402; *Brolaskey v. McClain*, 61 Pa. St. 166. A deed not delivered is not operative for any purpose, and is not, we think, a written instrument within the statute in question; certainly it cannot be considered such as between parties and privies to an action in which its nondelivery and invalidity have been adjudged. For these reasons the possession of the defendant after the judgment could not become adverse for the purposes of the ten years statute without he acquired a new claim of title, or made a new entry or its equivalent. His subsequent possession, even if adverse, has not been under claim of title exclusive of any other right, founding such claim upon some written instrument as being a conveyance of the premises in question, and therefore the defense under section 4211, Revised Statutes, has not been made out. His possession subsequent to the judgment did not continue twenty years before this action was commenced, so as to enable him to make out a defense under sections 4213, 4215. The case of *Mabary v. Dollarhide*, 98 Mo. 198, 14 Am. St. Rep. 639, and cases there cited, are distinguishable from this, in that the judgment or decree relied on to interrupt the course of the statute was not one between tenants in common, adjudging void a previous conveyance essential to the statutory bar, and that it had never been delivered, and that the parties to the suit held and owned the lands in question as tenants in common, so that by force of the judgment the possession of the defendant was made necessarily the possession of each and all of them, and thereby its former adverse character taken away.

2. The silent possession of the defendant since the judgment, accompanied by no act which can amount to an ouster, will not be construed into an adverse possession: *Challefoux v. Ducharme*, 4 Wis. 554, 564. If the fact that the parties are cotenants is established, the burden is upon the one claiming to hold adversely to establish such a state of facts, known to his cotenant, as will amount to an adverse claim of title. Though in ordinary cases open and notorious possession is sufficient, in case of tenants in common the rule is different: *Freeman on Cotenancy*, sec. 22; *Clymer v. Daw-*

kins, 8 How. 674; *Barr v. Gratz*, 4 Wheat. 213. In *Sydner v. Palmer*, 29 Wis. 249, the rule is laid down that, "where one tenant in possession, having once acknowledged the right or title of the other tenants, seeks to oust or dispossess them, and to turn his occupancy into an adverse possession or enjoyment, so as to acquire the title of the entire estate by lapse of time under the statute of limitations, he must show when knowledge of such adverse claim, or of his intention so to hold was brought home to the other tenants; for from that time only will his possession be regarded as adverse." Such is always the rule, unless the exclusive use and enjoyment, or sole and uninterrupted possession and permanency of the profits by one tenant in common have been so long continued as to give rise to the presumption of or justify the jury in finding knowledge or acquiescence on the part of the other tenants for the period prescribed by the statute. But, whatever view may be taken of this branch of the case, the defense of the statute of limitations, for reasons already stated, wholly fails. Authorities to this effect exist in great number, and we hold that the rule is the same where the cotenancy of the parties has been adjudged in a suit to which all the cotenants were parties. The evidence wholly fails to meet the requirements of this rule, and shows only an open and notorious possession by the defendant, which, as we have seen, is not, as between tenants in common, sufficient.

Our conclusion upon the whole case is that the judgment in the former suit prevents the deeds under which the defendant claims being made a basis or foundation for the ten years statute of limitations, and this view seems to be decisive of the merits of the case. As to the claim of laches, and of the defendant's equity founded upon his having made permanent and valuable improvements on the premises, it is sufficient to say that when the judgment was rendered in the former suit, which was affirmed by this court, the defendant well knew that he had no interest in the lands except as tenant in common with the other claimants. He has not, so far as the evidence shows, been misled by the conduct of his cotenants, nor did he notify them, after the judgment in the former case, that he claimed the entirety of the premises. According to his own testimony, he kept on claiming title under the old deed, disregarding the judgment which declared it void, and that it had not been delivered. He cannot now have any claim, except to an accounting between his coten-

ants, which may, perhaps, afford him a remedy, but of this we express no opinion. For these reasons the judgment of the circuit court must be reversed, and inasmuch as there is no finding upon the question of mesne profits or damages, a new trial must be awarded.

By the COURT. The judgment of the circuit court is reversed, and case remanded for a new trial.

JUDGMENTS—SETTING ASIDE DEEDS, CONCLUSIVENESS OF.—A former recovery in *assumpsit* against the heirs of a deceased debtor to which they pleaded *riens per descent*, and the issue was found against them, may be given in evidence by way of estoppel in an ejectment suit, brought by them against a purchaser under the judgment in which they claim under a deed from their ancestor, which was submitted to and found invalid by the jury in the former action: *Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603. A judgment of a court of competent jurisdiction in Indiana, setting aside a deed to the grantor's wife, is conclusive in a suit in Illinois as to another deed made at the same time, by the same grantor, to a trustee, for his wife: *Hanna v. Read*, 101 Ill. 596; 40 Am. Rep. 608. A judgment in an action brought to set aside a quitclaim deed to certain real estate against the plaintiff in this action is conclusive and binding upon the plaintiff below in this case, on the question of title to the real estate in question: *Oldham v. Stephens*, 45 Kan. 369. A judgment affecting the title to real estate, until reversed or vacated, is binding and conclusive as between the parties to the action or their privies: *Challiss v. Atchison*, 45 Kan. 22; *Broussard v. Broussard*, 43 La. Ann. 921. A judgment against the parties under whom the defendant claims, setting aside the deed, so far as it purports to convey the interests of the children, is not conclusive on the liability of the widow and children on her covenants: *Foote v. Clark*, 102 Mo. 394.

ADVERSE POSSESSION—INTERRUPTION.—See extended note to *Peabody v. Hewett*, 83 Am. Dec. 497. Adverse possession must be uninterrupted for the statutory period to toll the owner's right of entry: *Trotter v. Cassady*, 3 A. K. Marsh, 365; 13 Am. Dec. 183. Adverse possession to be available as a defense or as title must have been continuous both in time and interest: *San Francisco v. Fulde*, 37 Cal. 349; 99 Am. Dec. 278, and note, and a voluntary abandonment without the intention of returning and retaking possession, no matter for how short a time, destroys adverse possession: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334, and note with cases collected, and the same is true even if there is the intention to return: *Louisville etc. R. R. Co. v. Philyaw*, 88 Ala. 264, but a single instance of attempted interruption resulting in no actual interruption, followed by no attempt to test the right does not destroy the presumption of a grant founded upon a user in other respects sufficient: *Connor v. Sullivan*, 40 Conn. 26; 16 Am. Rep. 10. Adverse possession must be constantly continued by acts on the premises: *Olewine v. Messmore*, 128 Pa. St. 470.

ADVERSE POSSESSION BETWEEN COTENANTS—BURDEN OF PROOF.—The possession of one tenant in common is *prima facie* not adverse to his cotenants: *Warfield v. Lindell*, 30 Mo. 272; 77 Am. Dec. 614, and note with prior cases collected; *Berthold v. Fox*, 13 Minn. 501; 97 Am. Dec. 243, and note; *Warfield v. Lindell*, 38 Mo. 561; 90 Am. Dec. 443, and note; *Carpentier v.*

Mendenhall, 28 Cal. 484; 87 Am. Dec. 135; see notes to *Gillaspie v. Osburn*, 13 Am. Dec. 140, and *Barnard v. Pops*, 7 Am. Dec. 228. The presumption is, that the possession of one tenant in common is the possession of all, and this can be rebutted only by proof of actual ouster: *Israel v. Israel*, 30 Md. 120; 96 Am. Dec. 571, and note.

FARR v. TRUSTEES OF THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN.

[88 WISCONSIN, 446.]

JOINT TENANCY IN LIFE INSURANCE.—A membership certificate of life insurance issued to a husband in which his wife and daughter are named as beneficiaries makes them joint tenants as to the fund, with right of survivorship.

Wickham and Farr, for the appellants.

John A. Daniels, for the respondents.

ORTON, J. On the twenty-eighth day of March, 1879, A. C. Peck became a member of the subordinate Banner Lodge, No. 17, at the city of Eau Claire, by virtue of a certificate of insurance duly issued by the Grand Lodge of the Ancient Order of United Workmen of the State of Wisconsin to the said A. C. Peck, by which said grand lodge promised and agreed, for a valuable consideration, to pay at the death of said A. C. Peck, according to the laws of the order, the sum of two thousand dollars to Ida B. Peck, the wife, and to Anna May Peck, the daughter, of said A. C. Peck (since intermarried with the coplaintiff J. F. Farr). On or about the eighth day of March, 1881, the said Ida B. Peck died. After her death the said A. C. Peck intermarried with the defendant Mary E. Peck, by whom he had one child, now living; and on the first day of March, 1891, the said A. C. Peck died. The defendant the grand lodge paid to the plaintiff Anna May Farr one half of said two thousand dollars on her giving bond, but refused, on demand, to pay her the other half of it; and she now demands the two thousand dollars by right of survivorship, on the death of her mother, as a joint tenant or joint beneficiary of the insurance. This being the controlling question in the case, no other need be considered.

It will be observed that the whole insurance of two thousand dollars is made payable to both Ida B. and Anna May Peck as an entirety. Since the death of Ida B., the grand lodge has so changed and amended its constitution and laws

that the whole insurance in such a case shall go and be paid to the surviving beneficiary. It is claimed by the learned counsel of the appellants that such amendment has the legal effect to control the direction of this insurance. Although it is not necessary to consider that question, it may be said that the grand lodge has at least approved in this way the policy of such a principle of law. The learned circuit court, after finding the facts, found as a conclusion of law that upon the death of Ida B. Peck before the death of the insured the appointment of her as a beneficiary became and was revoked, and the interest in the fund she would have been entitled to receive if she had survived the insured lapsed and reverted to the estate of A. O. Peck at his death, no other direction having been made by him. Judgment was entered dismissing the plaintiff's action with costs, without prejudice to the right of the administrator of the estate of Alderson C. Peck to recover the amount remaining unpaid of such insurance.

The learned counsel on both sides have presented unusually able briefs on the important questions involved in this case, and the court is greatly aided by their cogent arguments and the authorities cited in deciding the question upon which the case depends. The question whether this benefit insurance is made payable to the wife and daughter as an entirety or in severalty as tenants in common, or as joint tenants, is somewhat difficult of solution. It must be determined by its analogy to the terms "tenancy in common" and "joint tenancy" in respect to realty and at common law. They may be said to have the same nature and incidents. There may be joint tenancy of personalities, and, like the properties of a joint estate, they are derived from its unity, which is fourfold—of interest, title, time, and possession. Each of the joint tenants must have the entire possession as well of every parcel as of the whole. Where a horse is given to two persons, they are joint tenants: *Martin v. Smith*, 5 Binn. 16; 6 Am. Dec. 895. "A joint tenancy is where they have the same interest, arising from the same conveyance, commencing at the same time, and held by one and the same undivided possession. On the death of one, the entire tenancy remains to the surviving cotenants, and not to the heirs of the deceased": 2 Blackstone's Commentaries, 180. This insurance, payable to two persons, has all the essential characteristics of a joint tenancy, without any words or reasons appearing to indicate an intention to make it payable in severalty, or to have it go to heirs, or

to revert to the assured or to his estate, on the death of one of the beneficiaries. The assured lived about ten years after the death of his wife—one of the beneficiaries—and made no change in the direction as to whom the insurance should go to, but in the mean time procured another insurance of five thousand dollars for the benefit of his second wife, Mary E. Peck, his present widow. He must be presumed to have known the law, and that his daughter was entitled to the whole insurance on the death of his wife, and assented to such a construction of the policy. In a majority of the old states the *jus accrescendi* or right of survivorship in such a case has been abolished by statute without any exceptions. Most of the cases at common law relate to estates and devises. The unity of possession is the essential feature, so that, if an estate has been conveyed in parcenary and one of the tenants seeks to destroy the unity by a conveyance of his interest, it is a question whether such a deed is not a nullity: *White v. Sayre*, 2 Ohio, 110. “Where an estate is given to several persons jointly, without any expressions indicating an intention that it shall be divided among them, it must be construed a joint tenancy”: *Martin v. Smith*, 5 Binn. 16; 6 Am. Dec. 395. “When by the terms of a will there is an estate in joint tenancy at common law, and one or more of the tenants die in the lifetime of the testator, the principle of the common law applies, and the survivor takes the whole estate”: *Ball v. Deas*, 2 Strob. Eq. 24; 49 Am. Dec. 651. Such is the law in all cases of devise or bequest: *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290. This is sufficient to show the strictness of the doctrine at common law, especially as to devises.

This leads us to the consideration of our own statute on the subject of joint tenants. Our statute (Rev. Stats., sec. 2068) provides that “all grants and devises of lands made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.” The following section is that “the preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.” It will be seen that our statute makes many important exceptions, which save the doctrine of the common law in respect to the subjects named. This shows at least that there is nothing in our principles of government or policies of law opposed to the principle or doctrine of survivorship in joint

tenancy in such cases. We are more immediately concerned with joint tenancy in devises. On the principle of analogy, if devises to joint tenants with the *jus accrescendi* are lawful, so are legacies of personalties. They are substantially alike, and within the same reason, and they have been decided to be within the doctrine of the common law: *Jackson v. Roberts*, 14 Gray, 546; *Stires v. Van Renssalaer*, 2 Bradf. 172; 2 Redfield on Wills, 175. We may say, therefore, that legacies come within the exceptions of our statute, and that, when made to two joint legatees, without any words to indicate a severance of their interests, if one die, the survivor takes the whole legacy. The analogy between legacies and the benefits secured by a certificate or policy of a benefit insurance company or of a common life insurance company, when the insurance is payable to two or more persons jointly on the death of the assured, is still closer. The assured, like a testator, makes provision in writing for his wife and children, to be enjoyed on his death. He can change the direction of his bounty during his life. So far as the doctrine of joint tenancy and survivorship are concerned, they are strictly within the same reason. And so it has been held in respect to life insurance, if made for the benefit of a wife and children, the last survivor takes the whole: *Robinson v. Duvall*, 79 Ky. 83; 42 Am. Rep. 208. And so as to a fire insurance policy made to two persons jointly: *Northrup v. Phillips*, 99 Ill. 449. The same doctrine is held in respect to benefit insurance similar to that of this case: *Day v. Case*, 43 Hun, 179; *Covenant M. B. Assn. v. Hoffman*, 110 Ill. 603. See, also, Bacon's Benefit Societies, sec. 264. And so we conclude that this insurance in joint tenancy with the right of survivorship is within the exception of our own statute, in analogy to devises, and that the doctrine of the common law governs it. This is a new question in this state, but we are satisfied that the application of this doctrine to this case is within reason and the authorities. We are not called upon to vindicate the policy of this doctrine any more than to vindicate the exceptions of our own statute. This being decisive of the case, no other question will be considered. The question of interest, we think, was properly disposed of by the circuit court. There was no unreasonable delay of payment, as found by the court, and there is no fund to meet any such demand. The costs will go with the reversal of the judgment.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded with directions to render judgment in favor of the plaintiffs in accordance with this opinion.

JOINT TENANCY.—The assignment of a mortgage to two persons as trustees vests the title in them as joint tenants: *Webster v. Vandeventer*, 6 Gray, 428. Trustees, whose joint action is evidently contemplated, take as joint tenants: *Franklin Sav. Institution v. People's Sav. Bank*, 14 R. I. 632. Under a statute declaring, "Conveyances not in mortgage, and devises of land to two or more persons, create estates in common, unless otherwise expressed," it was held, in *Stetson v. Eastman*, 84 Me. 366, that a bequest of personal property to two or more persons individually named as legatees, without words indicating the nature of the tenancy to be created thereby, creates a tenancy in common, and not a joint tenancy. Under the New Jersey statute a joint tenancy cannot be created either by grant or devise, unless the intention of the donor to that effect is expressed in the instrument of gift: *Coudert v. Earl*, 45 N. J. Eq. 654. It should be noticed that none of the insurance cases cited by the court in the principal case were decided with reference to the peculiar doctrines of the common law relating to joint tenancy. Nor perhaps was it necessary, in the present instance, to resort to those doctrines for guidance. It is plain that the terms of the certificate created vested interests in the wife and child which could not be affected by any subsequent act of the father's, and even if those interests be regarded as separate and independent, the daughter would have been entitled to the entire benefits of the insurance under the statute of distributions. Such, in fact, appears to be the principle upon which the cases cited by the court were made to turn. The certificate, in this instance, being a contract, upon adequate consideration, to pay a certain sum of money to designated persons, could hardly bear any other interpretation than that the representatives of those persons should be entitled to their shares in case of their death before the time of payment arrived.

GEORGE v. MCGOVERN.

[83 WISCONSIN, 555.]

COTENANCY—RIGHT TO POSSESSION—RECOVERY FROM COMMON BAILEE.—

Each cotenant has a right to the possession of all property held in cotenancy equal to the right of each of his companions in interest, and superior to that of all other persons; but the possession of personal property owned by cotenants cannot be recovered from their common bailee in an action brought by one or less than all of them, unless such property is severable in its nature, or a remedy is provided by statute.

COTENANCY—ACTION BY ONE COTENANT AGAINST COMMON BAILEE—DE-

MAND.—When cotenants of personal property deliver it into the keeping of a third person he may detain it until all of the cotenants ask for its return and one of them cannot maintain an action to recover his share as against such common bailee without a demand in writing as provided by statute.

REPLEVIN for a carload of oats, wrecked on a railroad. The plaintiff, George, purchased the oats and offered one Fowle and Mansfield an equal share of them with himself if they would pay their share of their cost and help him remove them. Fowle and Mansfield accepted the bargain, and, with the consent of all parties, the oats were taken to Mansfield's barn then leased to and in the control of the defendant, McGovern, who assisted in getting the oats into the barn under an agreement with Fowle and Mansfield that he was to have one-third of their shares for so doing. The oats were to be divided in a short time, but the parties disagreed about such division, the defendant refused to let plaintiff have any of the oats until defendant had obtained his share thereof. Plaintiff then brought this action to recover his share of the oats. Judgment for plaintiff, and defendant appealed.

J. M. Clarke and W. C. Williams, for the appellant.

J. E. Wildish, for the respondent.

PINNEY, J. The effect of the transaction between the plaintiff, Fowle, and Mansfield was to make them tenants in common of the oats, and by consent of all the parties they were put in Mansfield's barn, rented to and in control of the defendant, who must be regarded as bailee of the oats by deposit, with a right to have, as against Mansfield and Fowle, two-thirds of their shares, equal to two-ninths of the whole. The general rule is that each cotenant has a right to the possession of all the property held in cotenancy, equal to the right of each of his companions in interest, and superior to that of all other persons; but the possession of a chattel cannot be recovered from a stranger in an action brought by less than all the owners of it. *Freeman on Cotenancy*, sec. 337. And a bailment made by all cannot be terminated by any less number (*Atwood v. Ernest*, 13 Com. B. 889) unless, perhaps, where the property, the subject of the bailment, is severable in its nature. The defendant, McGovern, as to the title to the oats, or claim of title, was an utter stranger to the plaintiff, but he was the bailee of all. The oats were divisible, and the shares in them capable of severance. Either cotenant might make division and take, if able, to his separate use, his share, so that, thus severed, it would become his sole property; and an officer with an execution against one cotenant might levy on his share, and make severance of it, and sell it. *Freeman on*

Cotenancy, sec. 338; *Newton v. Howe*, 29 Wis. 535; 9 Am. Rep. 616; *Kimberly v. Patchin*, 19 N. Y. 330; 75 Am. Dec. 334; *Clark v. Griffith*, 24 N. Y. 595. But this would not justify the plaintiff in this case in taking and selling the entirety of the oats as his own; and, if he did, *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334, and *Clark v. Griffith*, 24 N. Y. 595, show that he would be liable to pay the other co-owners for their shares.

At common law a part owner had no remedy to obtain possession of personal property in the custody of another part owner, although the latter repudiated the cotenancy and claimed the property in entirety. An action for partition in equity was the proper and only remedy in such a case, except where a statutory remedy has been provided, unless the plaintiff is able to make a severance of the property and take possession without resort to legal remedy. Freeman on Cotenancy, sec. 448. The statute of Wisconsin provides a remedy in such cases. Revised Statutes, sec. 4257, provides that, "when personal property is devisable, and owned by tenants in common, and one tenant in common shall claim and hold possession of more than his share or proportion thereof, his cotenant, after making demand in writing, may sue for and recover his share or the value thereof," etc. In this case it is clear that the plaintiff, without joining his co-owners, Fowle and Mansfield, could not recover the entirety of the oats; and he was not able by his own act to make severance and take into his possession his share in severalty. In general, the rule is that, where there is a want of proper joinder of a cotenant as plaintiff, the objection must be taken by plea in abatement, and that a cotenant may sue for his aliquot share or proportion of interest in chattels without joining his cotenant with him, subject, however, to be defeated by a plea in abatement of such nonjoinder; and, if the defendant fails to plead in abatement, the plaintiff may proceed, and have his recovery for his aliquot interest in the property, and the defendant will be confined to giving in evidence the joint ownership of the others in mitigation of damages: *Wheelwright v. Depeyster*, 1 Johns. 486; 8 Am. Dec. 345; *Starnes v. Quin*, 6 Ga. 86. But in replevin it is said that "no case was recollected in which it was held that a part owner could sue for his undivided part only." Per Parsons, C. J., in *Hart v. Fitzgerald*, 2 Mass. 511; 3 Am. Dec. 75; *Reinheimer*

v. Hemingway, 35 Pa. St. 438; *Cain v. Wright*, 5 Jones, 283; 72 Am. Dec. 551; *Rogers v. Arnold*, 12 Wend. 30; *Colton v. Mott*, 15 Wend. 619, 622; *Fay v. Duggan*, 135 Mass. 242; *Corcoran v. White*, 146 Mass. 329; 4 Am. St. Rep. 313. The action of replevin goes upon the right of property, and the judgment is conclusive of it, and so is distinguishable from other actions, except detinue. The above cases show that the objection of nonjoinder need not be taken in abatement and that it is good in bar.

In *Atwood v. Ernest*, 13 Com. B. 881, Maule, J., said: "Now, where several joint owners of a chattel deliver it to a third person, he may detain it until all the joint owners ask him to return it. If some of them ask him to return it, and others to keep it, the bailee is not liable to an action at the suit of those who so ask for a return. If that were so, each might have an action, and so the bailee might be harassed with as many actions as there were joint owners." But the statute clearly allows this result as to actions by one joint owner against another joint owner on previous demand in writing. The right of one joint owner to recover his share of property divisible in its nature, as against his co-owner, is made by the statute to depend upon his having made a previous demand therefor in writing. There was no proof of a previous demand in writing by the plaintiff for his share, and it is clear, therefore, that he could not in this action recover his unsevered share, even if it be conceded that an action under the statute would lie for the share of either cotenant against the common bailee of all, in respect to which we give no opinion. It cannot be said, therefore, as a matter of law, that the plaintiff was entitled to a verdict. For these reasons it was error to direct a verdict in favor of the plaintiff for the entirety of the oats. The evidence tends very strongly to show that the plaintiff, Fowle, and Mansfield were co-owners. The judgment of the superior court must therefore be reversed.

By the COURT. The judgment of the superior court of Milwaukee county is reversed, and the cause remanded for a new trial.

COTENANTY—ACTION BY ONE CO-OWNER OF CHATTEL TO RECOVER POSSESSION.—One joint owner of a chattel cannot maintain replevin for it without joining his co-owners: *Corcoran v. White*, 146 Mass. 329; 4 Am. St. Rep. 313, and note; *Clapp v. Pawtucket Sav. Institution*, 15 R. I. 489; 2 Am. St. Rep. 915, and note. One tenant in common of chattels cannot maintain trover

against the vendee of the original cotenant, while he remains in possession of the property, although claiming it as sole owner: *Kilgore v. Wood*, 56 Me. 150; 96 Am. Dec. 440. If one of two persons jointly interested in a chattel delivers the possession of it to a third person, the other cannot recover the same by a possessory action in his own behalf alone: *Asken v. Nicholson*, 84 Ga. 478. One cotenant may maintain trover for his interest against a stranger to whom his cotenant has wrongfully delivered the property for purposes inconsistent with the uses for which it was designed, and who denies the plaintiff's title, and claims the exclusive possession and ownership: *Agnew v. Johnson*, 17 Pa. St. 373; 55 Am. Dec. 565.

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CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

HAWKINS v. TAYLOR.

[56 ARKANSAS, 45.]

STATUTE, REPUGNANCY OF.—A statute imposing a penalty of the amount of the judgment and costs and ten per cent damages for the failure to return an execution and a prior statute imposing for the failure to return an execution on or before the return day thereof a penalty of the whole amount of the money in such execution specified, are not so plainly repugnant that one must give place exclusively to the other. The one applies to an entire failure to return the writ, and the other to a failure to return it on or before its return day. Therefore if the return is made before the action is brought, though after the return day, the recovery cannot include the ten per cent penalty.

IF AN EXECUTION IS RETURNABLE WITHIN SIXTY DAYS FROM ITS DATE and the sixtieth day after such date is Sunday, the return must be made on or before the previous Saturday to exempt the officer from a penalty imposed by law in all cases where there is a failure to return a writ on or before the return day thereof.

PRACTICE—WAIVER OF PROCESS.—If a proceeding against an officer for not returning an execution is commenced by motion and the service of process by answering and going to trial, he submits himself to the jurisdiction of the court and cannot object that the proceeding was by motion and notice instead of by action and service of process.

EXECUTION AGAINST P. R. CRAVENS & Co. IS GOOD AS AGAINST P. R. CRAVENS.—The addition of the words, "and company," is at most an irregularity, and cannot excuse an officer for his failure to return the writ on or before its return day.

PROCEEDING against a sheriff by motion for a summary judgment for not returning an execution within sixty days. The writ was issued February 26, 1890, and received by the sheriff on the same day. On the 26th of April of the same year he indorsed his return thereon. "No property found," and two days later mailed the execution with such return

thereon to the clerk of the court, who received it on the same day. On the 12th of May following notice of motion was given for summary judgment. The court granted judgment as asked for by the moving party for the amount of the execution and ten per cent damages.

Sandels and Hill, for the appellant.

COCKRILL, C. J. 1. "For failure to return an execution" the statute imposes upon a sheriff a penalty equal to the amount of the judgment and costs and ten per cent thereon: *Mansfield's Digest*, sec. 3964.

For failure to "return any such execution on or before the return day therein specified" a statute, which was in force when the first was enacted, imposed a penalty of the "whole amount of money in such execution specified," and no more: *Mansfield's Digest*, sec. 3061. There is no such plain repugnance between the two provisions that the latter must yield and give place exclusively to the former: *Zerger v. Quilling*, 48 Ark. 157.

The two may stand together by applying the latter, according to its terms, in cases where there is a failure to return the execution "on or before the return day therein specified"; and by confining the other to cases wherein no return has been made at all.

The statute is highly penal, and its terms should not be extended by construction to cases not within its plain meaning. The ten per cent penalty has never been enforced in any case where the execution had been returned. In this case the return was made before suit was instituted. As the return was legal, although after the return day, there could be no recovery of the ten per cent penalty inflicted by the first section above.

2. The execution was returnable, by its terms and by the law, "within sixty days" from its date. The sixtieth day after its date was Sunday, and the execution was returned the next day thereafter. It is argued that, as no return could be made on Sunday, the officer might legally postpone the act until Monday. But the statute will not admit of that construction. It does not require the return to be made upon the sixtieth day only. If it did, and that day were Sunday, then the argument would be forcible. But executions are returnable "in sixty days from their date": *Mansfield's Digest*, sec. 2971, and a legal return may be made by the sheriff

at any time after the writ comes to his hands—even a return of *nulla bona*, if he knows that the defendant is insolvent, and is willing to take the hazard of his remaining so: *Reeves v. Sherwood*, 45 Ark. 520.

The penal statute moreover prescribes that he shall be liable for a failure to make his return “on or before the return day.” “On or before the return day” does not mean after the return day: *Alston v. Falconer*, 42 Ark. 114. And as the last day fell upon Sunday, it was the officer’s duty to make the return on the preceding Saturday: Crocker on Sheriffs, sec. 40; Sedgwick on Statutory and Constitutional Law, 858; Sutherland on Statutory Constructions, sec. 115; *Haley v. Young*, 184 Mass. 364; *Ex parte Simpkin*, 2 El. & E. 392; see Endlich on Interpretation of Statutes, sec. 393.

The return was not made on or before the sixtieth day, and the penalty was incurred under section 3061.

8. The proceeding was instituted by motion for summary judgment under sections 3963 and 3964, and it is argued that the plaintiff’s cause should fall, because those sections, as held above, do not apply. But the complaint contains all the allegations necessary to a recovery under section 3061. The defendant demurred to it, and, after the demurrer had been overruled and the cause continued to another term, consented to an order setting aside the continuance, filed his answer and went to trial. Either of these acts was sufficient to enter his appearance and waive the formal issue and service of summons. The defendant was therefore in court, and cannot now be heard to object that he was brought in by notice instead of summons.

4. The judgment was against P. R. Cravens & Co., and the execution followed it. It was good as to P. R. Cravens. Adding the words “and company” after his name was at most an irregularity, and it afforded no excuse to the officer for refusing or neglecting to return it: *Jett v. Shinn*, 47 Ark. 873.

The judgment will be reversed, and judgment entered here for the amount of the execution and interest without damages.

It is so ordered.

STATUTES—EFFECT OF REPUGNANCY IN.—Where two grants of power are repugnant the last expressed will of the legislature must control: *Korah v. Ottawa*, 32 Ill. 121; 83 Am. Dec. 255; *State v. Howe*, 28 Neb. 618; but where the first clause of a section of a statute clearly is in accordance with the policy and intent of the legislature it will not be controlled or effected by a later and inconsistent clause which does not accord with this intent and policy: *McCormick v. West Duluth*, 47 Minn. 273.

EXECUTION—EFFECT OF VARIANCE.—A variance between a judgment and an execution does not render the latter void if it is shown to be intended, issued, and enforced as an execution upon the former: *Anderson v. Gray*, 134 Ill. 550; 23 Am. St. Rep. 696. The omission of the christian names of the plaintiffs in a judgment does not render void an execution in which the names are fully stated: *Jennings v. Carter*, 2 Wend. 446; 20 Am. Dec. 635; but an execution cannot be amended after a sale under it by the substitution of the true christian name of the defendant, as shown in the judgment, instead of another inserted by mistake, so as to validate the sale: *Morris v. Balkham*, 75 Tex. 111; 16 Am. St. Rep. 874. See further on this subject the extended note to *Graham v. Price*, 13 Am. Dec. 201.

SUNDAY.—Where the last day for redemption falls on Sunday it may be made the next day: *Backer v. Pyne*, 130 Ind. 288; 30 Am. St. Rep. 231, and note; *Porter v. Pierce*, 120 N. Y. 217; *Bovey etc. Lumber Co. v. Tucker*, 48 Minn. 223. The protest of a note without days of grace, falling due on Sunday, is premature and wrongful if made on the preceding Saturday: *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452; 29 Am. St. Rep. 660, and note; but when the last day of grace falls on Sunday the time of the note is shortened by a day: *Bartlett v. Leathers*, 84 Me. 241. In computing the five days which must elapse after seizure before the appraisement, if the fifth day falls on Sunday it is excluded: *Davis v. Davis*, 128 Pa. St. 100.

PROCESS—WAIVER OF DEFECTS IN BY APPEARING OR ANSWERING.—A voluntary appearance waives all objections to a summons and to the return thereof: *Union Pac. Ry. Co. v. De Busk*, 12 Col. 294; 13 Am. St. Rep. 221, and note; *Hausman v. Burnham*, 59 Conn. 117; 21 Am. St. Rep. 74; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134; 7 Am. St. Rep. 129; *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532; *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9; 74 Am. Dec. 124, and note; *Cartwright v. Chabert*, 3 Tex. 261; 49 Am. Dec. 742; *Hanna v. McKenzie*, 5 B. Mon. 314; 43 Am. Dec. 122, and note; note to *Alley v. Caspari*, 6 Am. St. Rep. 180; *Pixley v. Winchell*, 7 Cow. 366; 17 Am. Dec. 525, and note.

RUDY v. AUSTIN.

[56 ARKANSAS, 73.]

A VOLUNTARY CONVEYANCE IS PRESUMED TO BE FRAUDULENT AND VOID AS AGAINST EXISTING CREDITORS.—If the grantor is at the time insolvent and unable to pay his debts the presumption is conclusive.

A VOLUNTARY CONVEYANCE IS NOT, AS AGAINST SUBSEQUENT CREDITORS, FRAUDULENT NOR VOID, though the grantor was indebted at the time it was executed. To make it fraudulent, proof of actual or intentional fraud is required.

FRAUDULENT CONVEYANCE.—If the maker of a voluntary conveyance is insolvent at the time, he is presumed to have had a fraudulent intent as to subsequent as well as to existing creditors, especially if he contracts debts immediately or so soon thereafter as to show that he reasonably had in contemplation the contracting of such debts at the time the transfer was made.

A VOLUNTARY CONVEYANCE IS FRAUDULENT AND VOID AS AGAINST SUBSEQUENT CREDITORS IF THE GRANTOR WAS INSOLVENT when it was

made and was then engaged in a business in which it was necessary for him each year to devote its proceeds to the payment of antecedent indebtedness, and to obtain additional credit for current expenditures.

VOLUNTARY CONVEYANCE—WHO MAY ATTACK.—If the maker of a voluntary conveyance was insolvent when it was executed, but paid his debts then existing by creating others, the holders of these later debts become subrogated to the rights of the creditors existing when the conveyance was made, and are therefore entitled to assail the voluntary conveyance as a fraud upon them.

ACTION by John M. Rudy to quiet title to real property conveyed to him while a minor, and sold by his father, acting as his guardian. The plaintiff claimed that this sale was made under an agreement between the father, as guardian, and Lynch, Neal, and Austin, his creditors, whereby they agreed to purchase the property at a guardian's sale to be thereafter made, and the guardian to accept payment in the indebtedness owing by him to such creditors. By way of cross-complaint the defendants alleged that the father, being insolvent, purchased the property in controversy and caused it to be conveyed to his son, then only six years of age; that the father remained insolvent until his death; that the conveyance to the son was made for the purpose of defrauding the father's creditors; that the father was engaged in business, and to pay his indebtedness finally entered into the agreement relied upon by the plaintiff and under which the property thus conveyed to plaintiff was to be sold and the proceeds thereof to be applied to the payment of the father's debts. The conveyance to the son was made in 1870, and the guardian's sale in 1879. Judgment in favor of the defendants on their cross-bill.

U. M. and G. B. Rose, for the appellant.

Turner and Turner, for the appellee.

BATTLE, J. The defendants in the cross-complaint having failed to controvert the allegations therein the same should have been taken as true. The circuit court properly treated them as confessed: Mansfield's Digest, sec. 5072.

The conveyance of the lots in controversy by Divilbliss and wife to the appellant was virtually a conveyance by George H. Rudy to his son, John M. Rudy, the same having been purchased and paid for by the father. It was a voluntary conveyance. Was it void as to the creditors of Rudy?

A debtor has the right to make reasonable provisions in property for his wife or children according to his state and

condition in life. But in doing so he must retain in his possession property amply sufficient to pay all his debts. If he does so fairly and honestly, the child or wife for whom the provision was made is not bound to refund the advancement, for the benefit of creditors, in the event the parent or husband should subsequently fail or become unable to pay the debts he owed when the provision was made: *Bertrand v. Elder*, 23 Ark. 494.

The law requires every man to be just before he is generous. If he makes a voluntary conveyance while he is in debt, it presumes that it is fraudulent as to existing creditors, and the burden is on those claiming under the conveyance to repel the presumption. If he be insolvent, unable to pay his debts, the presumption that it is fraudulent as to antecedent creditors is conclusive. The rule is correctly stated in *Driggs etc. Bank v. Norwood*, 50 Ark. 46, 7 Am. St. Rep. 78, as follows: "Every voluntary alienation of his property by an embarrassed debtor is presumptively fraudulent against existing creditors. Indebtedness raises a presumption of fraud, which becomes conclusive upon insolvency. But as to subsequent creditors, a voluntary conveyance by a person in debt is not *per se* fraudulent. To make it so, proof of actual or intentional fraud is required."

According to the uncontroverted allegations of the cross-complaint George H. Rudy was unquestionably insolvent; and the conveyance to his son was void as to existing creditors. Was it void as to subsequent creditors?

Against subsequent creditors a voluntary conveyance executed by a grantor in debt at the time is not void, unless actually fraudulent. To make it fraudulent proof of actual or intentional fraud is required. As to what will be sufficient proof of such fraud the authorities are obscure and conflicting.

In order for a subsequent creditor to avoid a voluntary conveyance it is not sufficient to show that there are "debts still outstanding, which the grantor owed at the time he made it," as held in *Toney v. McGehee*, 38 Ark. 427. Mere indebtedness is no evidence of fraud as to such creditors. But the insolvency of the grantor at the time of the conveyance is at least *prima facie* evidence of a fraudulent intent as to them, "because a transfer of property under such circumstances affords a reasonable ground of presumption that the intention with which it was made was to put beyond the

reach of creditors, future as well as present, the property to which they had a right to resort for the payment of their debts." This presumption would necessarily arise if the grantor contracted debts immediately or so soon thereafter as to show that he reasonably had in contemplation the contracting of such debts at the time the transfer was made. From his inability to pay and the voluntary alienation the conclusion would naturally follow that he did not intend to pay such debts when they were contracted, and that the conveyance of the property was intended to delay or prevent the collection thereof by the sale of the property under due process of law: *Winchester v. Charter*, 12 Allen, 606; *Winchester v. Charter*, 97 Mass. 140; *Morrill v. Kilner*, 113 Ill. 818, 822; *Moritz v. Hoffman*, 35 Ill. 553; *Taylor v. Coenen*, L. R. 1 Ch. Div. 636, 641; *Reade v. Livingston*, 8 Johns. Ch. 501, 502; 8 Am. Dec. 520; *Redfield v. Buck*, 35 Conn. 328, 337; 95 Am. Dec. 241; *Ridgeway v. Underwood*, 4 Wash. C. C. 137; *Howe v. Ward*, 4 Greenl. 195, 206; *Sexton v. Wheaton*, 8 Wheat. 229, 252; *Horn v. Volcano Water Co.*, 18 Cal. 71, 72; 73 Am. Dec. 569; Bump on Fraudulent Conveyances, 3d ed., 322; 2 Bigelow on Frauds, 99, 181, 200; May on Fraudulent Conveyances, 75; 1 Am. Lead. Cas., 5th ed., 42; 2 Pomeroy's Equity Jurisprudence, sec. 973.

This case is a fair illustration of the rule. At the time of the execution of the conveyance in question George H. Rudy was insolvent; his liabilities far exceeded his ability to pay. His vocation was farming. He had been engaged in that business for many years previous to the execution of the deed by Divilbliss and wife, and continued to farm many years thereafter. He had no other occupation, so far as is shown by the evidence. In following his vocation he purchased extensively goods, wares, merchandise, and supplies needed to support his family and in his farming operations, on a credit, from merchants in Van Buren. He made large crops, and, when gathered, delivered them to the merchants to whom he was indebted, to be appropriated to the payment of his accounts. His crops would fall far short of paying his debts, and the result was he continued to farm and contract debts and pay them in this manner every year, so far as the proof shows, using the crops of one year to pay the debts contracted in the preceding year and the current year, so far as they would extend, and was always in debt with his merchants. In this way he did business with Lynch prior to

and at the time of the execution of the deed to appellant, and was in debt to him when the lots in controversy were conveyed to his son. In this way he continued to do business with him until he became a partner of Neal. In 1871, a short time after the execution of the deed in question, he commenced buying of Neal, and in this way purchased from him and delivered crops on account until 1874, when he and Lynch became partners, and in this way did business with them until 1881; and in this way commenced business with Austin in 1876, and did business with him in the years 1876 and 1877. His habits and necessities of business were such as to plainly show that he, at the time he caused the lots to be conveyed to his son, necessarily had in view and knew that he would contract debts in the manner he did, and that his intention in procuring the execution of the deed to his son was to put beyond the reach of his creditors, antecedent and subsequent, the lots in controversy, and to deprive them of the right to appropriate them by due process of law to the payment of his indebtedness. He could not reasonably have had any other motive. His son was about six years old, and there was no occasion for making any such provision at that time. All these facts go to prove the uncontroverted allegation of the cross-complaint that he caused the deed to be made to the appellant in order to defraud his existing creditors, "and in anticipation of and reference to his subsequent indebtedness and insolvency"—to defraud his subsequent creditors.

In paying the debt which he owed to Lynch at the time of the execution of the deed to his son, he did so by contracting another with Lynch and Neal in lieu of it, and thus continued to pay one by contracting another until he contracted the indebtedness of six thousand dollars, in the payment of which he attempted to convey the lots in controversy, by authority of the probate court. In this way Lynch and Neal, if not Austin, became subrogated to the right Lynch had to treat the conveyance in question as fraudulent (he being a creditor at the time it was executed), and to have the same set aside; became entitled to the same rights as those of the creditors whose debts their means have been used to pay: *Barhydt v. Perry*, 57 Iowa, 416, 419; *Madden v. Day*, 1 Bail. 337, 587; *Mills v. Morris*, Hoff. Ch. 419; *Brown v. McDonald*, 1 Hill Ch. 297, 304; *Savage v. Murphy*, 34 N. Y. 508; 90 Am. Dec. 733; *Churchill v. Wells*, 7 Cold. 364; *Wilson v. Buchanan*, 7 Gratt.

334; *Paulk v. Cooke*, 39 Conn. 566, 572; *Anon*, 1 Wall. Jr. 107; *Creed v. Lancaster Bank*, 1 Ohio St. 1; Bump on Fraudulent Conveyances, 3d ed., 322; Wait on Fraudulent Conveyances, 2d ed., 103; Am. Lead. Cases, 5th ed., 44.

Our conclusion is, that the conveyance to the appellant was fraudulent, and can be so treated by the creditors in this action: Acts of 1887, 193.

As it does not appear that George H. Rudy had any creditors at the time of his death except Lynch, Neal, and Austin, and the lots in controversy are not worth exceeding two thousand dollars, and as the indebtedness, in satisfaction of which the same were sold, amounted to six thousand dollars, exclusive of interest, and as it is to the interest of Rudy's estate and heirs that the contract of Rudy and his creditors, and the sale made in conformity therewith, should be permitted to stand, and as the conveyance to John M. Rudy is fraudulent and void, and he concedes that, this being true, he has no further interest in this cause, and has no objection to any course that this court may take in appropriating the lots in controversy to the payment of his father's debts, we decline entering into the consideration of what the proper practice as to the disposal of the lots is, and no one concerned, under the circumstances, objecting, affirm the decree of the circuit court.

Affirmed.

HEMINGWAY, J., did not sit in this case.

IN the case of *Crampton v. Schaap*, 56 Ark. 253, it appeared that one Seybert, before becoming indebted to the plaintiff, Schaap, purchased real property and caused it to be conveyed to his wife; that she, upon his death, administered upon his estate, and the whole thereof was set aside to her, and she had later also sold the property thus conveyed to her, and had then intermarried with her codefendant, Crampton. The trial court ordered moneys owing to Mrs. Crampton and derived from the estate of her husband to be paid to plaintiff. In reversing this decision the appellate court reaffirmed the rule stated in the principal case, to the effect that to avoid a voluntary conveyance a subsequent creditor must show that it was made with an actual intent to defraud, and that the presumption that such was the intent cannot be created merely by proving the existence of an indebtedness when the conveyance was executed; that the presumption of fraud does arise on proof that the grantor was insolvent at the time of the transfer, but that such presumption is not conclusive in favor of subsequent creditors. These rules were, however, held inapplicable to the controversy, because it did not appear that soon after the making of the conveyance the grantor contracted debts which he could not have reasonably expected to pay, nor was any connection shown between his debts existing at the transfer and

the debt of the plaintiff created some nine years after the date of the conveyance, nor that any of the debts existing at the transfer had been paid by contracting other debts, nor that there was any reason for subrogating plaintiff to the rights of any creditor whose claims arose prior to the conveyance.

VOLUNTARY CONVEYANCES—EFFECT OF AS TO EXISTING CREDITORS.—A voluntary conveyance of his property by an embarrassed debtor is presumptively fraudulent as to existing creditors: *Driggs etc. Bank v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78, and note. A voluntary conveyance will be treated as fraudulent and void as to existing creditors: *Snyder v. Partridge*, 138 Ill. 173; 32 Am. St. Rep. 130, and note. This question is thoroughly discussed in the monographic notes to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739, and especially at page 746; and *Jenkins v. Clement*, 14 Am. Dec. 706.

VOLUNTARY CONVEYANCES—RIGHT OF SUBSEQUENT CREDITOR TO ATTACK: *Fellington v. Northwestern Importers' etc. Assn.*, 48 Minn. 490; 31 Am. St. Rep. 663, and note with cases collected; *Daggett etc. Co. v. Bulfer*, 82 Iowa, 101; 31 Am. St. Rep. 464, and note; extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 750; and extended note to *Jenkins v. Clement*, 14 Am. Dec. 706-708.

PEARSON v. STATE.

[56 ARKANSAS, 143.]

MUNICIPAL CORPORATIONS—RIGHT OF LEGISLATURE TO RELEASE OBLIGATIONS TO.—If the treasurer of a county has become liable on his official bond to the various school districts therein, on the ground that their moneys were taken by burglars without his fault from a safe furnished him by the county, it is competent for the legislature to release him from such liability.

CONSTITUTIONAL LAW—GIFT OF PUBLIC PROPERTY, WHAT IS NOT.—An act of the legislature releasing a county treasurer from liability for moneys stolen from him without his fault by burglars is not a gift of municipal or public property, but a release of a claim which, though legally due, the legislature finds it to be unjust and oppressive to enforce.

A. S. McKennon, for the appellant.

Anthony Hall, for the appellee.

HEMINGWAY, J. The single question in this case is, whether it was competent for the legislature to release the treasurer of Logan county from his liability to pay the county and various school districts therein the amounts received by him for them, on the ground that the money was taken by burglars, without fault on his part, from a safe furnished him by the county for keeping it.

The appellant contends that the power of the legislature was absolute; that counties and school districts are but agencies of the state created by it to aid in the conduct of govern-

ment, and that they, with their possessions, are subject to the will of the legislature, to be controlled, maintained, or destroyed as it directs—except as the power is limited by provisions expressly applicable to it. .

The burden is upon the appellee to show that the power is denied to the legislature. He insists that it is denied: 1. By the provision of section 3, article 14, of the state Constitution, which ordains that no school tax shall be appropriated to any other purpose nor to any other district than that for which it was levied; and 2. By the provisions of the state and federal constitutions that prohibit legislation divesting property rights or impairing the obligation of contracts: Const. 1874, secs. 8–17, 21, art. 2; Const. U. S., sec. 10, art. 1, 14th amdt.

We think it clear that the appellee's first ground is not well taken. The provision relied upon prohibits only certain appropriations of the school tax, and as the act of the legislature relied upon by the appellant did not appropriate the school tax, or any part of it, it does not contravene that provision.

The school tax, to which alone the constitution applies, had been appropriated by burglars, as the preamble of the act recites, before its passage, and was not subject to legislative appropriation. The act did not concern it, but concerned only the liability of a keeper of public money, by the terms of a bond, to indemnify the various municipalities interested in it against his failure to pay over moneys thus lost. If the enactment transcended the powers of the legislature, the limitation must be found in the other provisions relied upon, and not in the one under consideration.

If the bond had been executed to a private individual it is clear that the legislature could not have released the liability; but whether the constitutional provisions for the protection of private contract, and property rights, which are found in much the same form in the constitutions of most of the states and of the United States, apply to the contracts and property of municipal and *quasi* municipal corporations is a question upon which judicial deliverance has been frequent, full and not entirely uniform. There is no legal question upon which the books contain a richer or more abundant treasure of learning and judicial argumentation.

It was indicated in *Dartmouth College v. Woodward*, 4 Wheat. 518, that the right of the legislature, as regards the property of municipal corporations, was broader than existed in the

case of private corporations, and from that time to the present this has been a conceded principle. But it was said by different judges, in their separate opinions in that case, that the power of the legislature over the property of corporations purely public was not absolute or unlimited; and while there are some later cases to be found that seem to question this view, it is generally approved, and it is now established that though such property is subject to a very broad legislative regulation its confiscation or diversion violates the provisions relied upon: *Board of Park Commrs. v. Common Council*, 28 Mich. 240; 15 Am. Rep. 202.

The power of regulation seems to have no limit within the scope of municipal uses, and is restrained only when it attempts a total diversion. It affords a wide, almost limitless, field for legislative action. The legislature may do with the property whatever the municipality is bound to do, either at law or in equity; or whatever upon recognized moral principles ought to be done; and it has been held that it may do acts of charity or gratitude for the municipality—though this cannot be considered as established.

It seems profitless to repeat the arguments and conclusions with which the books abound upon the subject. All the purposes of this case are met when we announce our conclusion; those interested in the subject will find in the references a treatment to which the writer could hope to add nothing.

The statement that counties and school districts are agencies of the state, and therefore subject to legislative control or annihilation, is a misleading generality. The corporate entity is a legislative creation, and its powers may be restrained, its functions changed, or its existence destroyed, at the will of the legislature; but in so far as it has acquired and holds property, it is but a trustee for the local public; and although its powers be withdrawn or its existence ended, the property which survives it belongs to the same public, and must be in some way applied to its use. It has no contract right to exist as a corporation, but the public that it represented has a vested right in the municipal property acquired for its benefit, and is entitled to demand that such property be applied to its uses: *Cooley's Constitutional Limitations*, 6th ed., 291; *Lucas v. Board of Commrs.*, 44 Ind. 524; *Skinkle v. Essex Road Board*, 47 N. J. L. 93; *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93; *Essex Public Road Board v. Skinkle*, 140 U. S. 334; *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79;

Hasbrouck v. Milwaukee, 18 Wis. 50; 80 Am. Dec. 718; *State v. Haben*, 22 Wis. 660; *People v. Hurlbut*, 24 Mich. 95; 9 Am. Rep. 103; *Board of Park Commrs. v. Common Council*, 28 Mich. 240; 15 Am. Rep. 202; *Spaulding v. Andover*, 54 N. H. 88; *Trustees of Aberdeen Female Academy v. Mayor etc.*, 18 Smedes & M. 645; 1 Dillon's Municipal Corporations, sec. 68a; *Town of Guilford v. Supervisors etc.*, 13 N. Y. 149.

Although the property cannot be diverted from the use of its original beneficiary, the manner of the use is subject to legislative regulation, and the legislature may direct and control the use; and if the original beneficiary enjoy it in any way, there is neither diversion nor confiscation, which the constitution prohibits. If the legislature uses it as the beneficiary ought to have done, the law deems it as devoted to the use of the beneficiary—and this though the particular application be made to satisfy a demand not enforceable in law or equity, but sanctioned only by established principles of right and fair dealing: *Creighton v. San Francisco*, 42 Cal. 446; *Sinton v. Ashbury*, 41 Cal. 525; 1 Dillon's Municipal Corporations, secs. 68, 75; *New Orleans v. Clark*, 95 U. S. 644.

The power of the legislature to release a debt due to a municipality is of the same kind as its power to impose a debt on a municipality. It can do neither arbitrarily or capriciously, and must do either within the scope of a proper superintending control and trusteeship. Speaking as to the latter power, this court said, in *Perry Co. v. Conway Co.*, 52 Ark. 430: "The better doctrine is, that the power of the legislature to impose the debt of one county upon another, depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the legislature may so ordain whenever it finds the moral obligation to exist." Applying that principle to this class of cases, we hold that the power of the legislature to release a municipal claim depends upon the illegal, inequitable, or unjust character of the claim and the moral obligation to release it, and that whenever it finds a debt to be of that character it may exercise the power.

Whether the legislative finding of a moral obligation is subject to judicial review we need not determine; it is certainly conclusive unless it clearly appears to be baseless: *Hoagland v. Sacramento*, 52 Cal. 142.

In this case the treasurer was a bailee, or quasi bailee, of a large fund, for which he was bound by written contract to

account, with no exoneration on account of sums that might be taken from the treasurer's safe by burglars. He was required to keep the fund, and was forbidden to use or lend it. That he might perform his undertaking, the county provided a vault and safe in which the money was kept until it was taken by burglars. He had in every respect been faithful, and done all that the highest degree of prudence could demand. The money was taken from the place provided by the county for keeping it without any fault on his part, and the legislature finds that it is contrary to broad equitable principles—the ordinary principles of just and fair dealing—to compel him to stand the loss.

Such facts have been interposed as constituting a perfect defense in suits upon bonds such as he gave: 1 Dillon's Municipal Corporations, sec. 238, note 4; *Halbert v. State*, 22 Ind. 125; and although it has been held that the defense was cut off by the terms of the bond, the fact that it has been interposed by learned counsel and considered by exalted tribunals argues that it has a foundation of fairness and justice to rest on. It would constitute a complete defense to an ordinary bailee, and the fact that it is not a perfect defense under the exacting terms of a written contract does not disprove the justness of releasing the demand.

The course of legislation in this and other states lends support to that view. As far back as 1840, and continuously since that time, acts have been passed in this state to release officers and their sureties from debts legally due by them to various counties, where the liability arose without fault of the officer; and similar legislation abounds in other states. While such acts do not determine the question of constitutional law, they bear evidence of the public sense of justice and right. Whether the considerations that induce such acts are adequate, and whether public policy and interests are subserved by such legislation, are questions of grave doubt; but their solution is with the legislative, and not with the judicial, department of the government.

Similar acts have been sustained by other courts: *Board of Education v. McLandsborough*, 36 Ohio St. 227; 38 Am. Rep. 582; *Mount v. State*, 90 Ind. 29; 46 Am. Rep. 192; *Mechem on Officers*, sec. 913.

The act in question was treated by counsel for appellee as a gift of municipal property, and if that was its character it could not be sustained; but when subjected to the test of rigid

scrutiny, it is seen to be, not a gift of property, but a release of a claim which, though legally due, the legislature found that it would be unjust and oppressive to collect.

In this view of the act, it comes within the scope of legislative authority. It follows that the court erred in refusing to quash the execution.

Reversed, and remanded.

OFFICERS—POWER OF LEGISLATURE OVER. — A county treasurer, in the collecting and accounting for its revenues, does not act in his capacity as a county officer, but as an agent or employee of the commonwealth: *Philadelphia v. Martin*, 125 Pa. St. 583. And the legislature may relieve a public officer from liability for funds that have been stolen from him without his fault: *Board of Education v. McLandsborough*, 36 Ohio St. 227; 46 Am. Rep. 582; *Mount v. State*, 90 Ind. 29; 46 Am. Rep. 192. But the vote of the electors of a school district, and of its board of education, without consideration to discharge the treasurer of the district from liability for money stolen from him without his fault is legally ineffectual to discharge him from his obligation: *Board of Education v. Jewell*, 44 Minn. 427; 20 Am. St. Rep. 586, and note.

BURGETT v. WILLIFORD.

[56 ARKANSAS, 187.]

JUDGMENTS.—A SUMMONS DEFECTIVE IN A MATTER WHICH IS AMENDABLE may be considered as amended when collaterally questioned.

JUDGMENT AGAINST INFANT DEFENDANTS.—A SUMMONS DIRECTED TO P. L. B., ADMINISTRATOR OF P. N. B., AND GUARDIAN of Bettie, Ida, and Peter Burgett, minors, is amendable, and though not amended, will support, upon a collateral attack, a judgment rendered against the minors upon a return of service upon their guardian, and upon each of them.

COTENANCY.—A PURCHASE BY A COTENANT OF THE LANDS OF A COTENANT AT A TAX SALE may vest title as against strangers. If the other cotenants do not complain a stranger cannot.

CONFLICT OF LAWS.—THE PERIOD OF MAJORITY of persons bringing suit must be settled according to the laws of the forum, though they reside in another state.

W. G. Weatherford, for the appellants.

U. M. and B. G. Rose, and E. F. Adams, for the appellees.

HUGHES, J. This a suit in ejectment brought by the appellants to recover of the defendants about three thousand acres of land in Crittenden county, which are described in the complaint. The cause was tried by the court without a jury. The court found the facts, declared the law, and gave

judgment for the defendants, from which the appellants appealed.

A decree of the Crittenden circuit court in chancey rendered in favor of Daniel L. Ferguson and H. L. Hampson, the vendors of the appellee, Williford's intestate, against Peter N. Burgett as administrator and guardian of Bettie, Ida W., and Peter L. Burgett, minors, and against the said minors as the infant heirs at law of the said Peter N. and Elizabeth G. Burgett, both deceased, as also the statutes of limitation of two years and of seven years, were relied upon by the appellees to defeat the claim of the appellants.

The Ferguson and Hampson decree was rendered upon a complaint in equity, to which said Peter L., Bettie, and Ida W. Burgett were made parties by name as the infant heirs at law of the said Peter N. and Elizabeth G. Burgett. A guardian was appointed for them, and appeared and answered the complaint. The decree in the cause was that the claims of the defendants to the lands described in it were clouds upon the title of the plaintiffs, Ferguson and Hampson, and that they be removed, and that the title of the said Ferguson and Hampson be quieted. The decree has not been reversed or set aside. It is stated by both the counsel for appellants and appellees that this decree covers nearly all the lands embraced in this controversy, and that if the said decree is valid, it settles this controversy in favor of the appellees as to the lands covered by it. But the appellants attack this decree on the ground that it was rendered without jurisdiction of the minor defendants thereto. To support this contention, they say that no summons issued for said infant defendants; that they were not served with process; that the decree is therefore void for the want of notice to them.

As stated above, they were named as defendants in the complaint. The summons in the record which issued in that cause with the return upon it is as follows:

"SUMMONS IN ACTION BY EQUITABLE PROCEEDINGS.

"*The State of Arkansas to the Sheriff of Crittenden County:*

"You are commanded to summon Peter L. Burgett, administrator of Peter N. Burgett, and guardian of Bettie, Ida, and Peter Burgett, minors, to answer, in twenty days after the service of this summons upon them, a complaint in equity filed against them, in the Crittenden circuit court, by Ferguson and Hampson, and warn them that, upon their failure to answer, the complaint will be taken for confessed; and

you will make a return of this summons on the first day of next October term of said court.

Witness my hand and the seal of said court
[SEAL] this twenty-ninth day of September, 1880.
A. H. FERGUSON, Clerk.

RETURN.

"State of Arkansas, County of Crittenden.

"I have this twenty-ninth day of September, A. D. 1880, duly served the within by giving a copy of the same to the within named Peter L. Burgett, as administrator and guardian of the within named Bettie, Ida, and Peter Burgett, minors, and giving to each of the said minors a copy of the same, as herein commanded.

W. F. BEATTIE, Sheriff.

"Fees \$3.25.

By W. F. MADOX, D. S.

"Returned and filed this twenty-ninth day of September, A. D. 1880.

A. H. FERGUSON, Clerk."

The recitals of the decree are as follows: "And now on this day this cause came on for hearing upon the bill and exhibits thereto, and the answer of S. P. Swepston, guardian *ad litem* of the infant defendants, Bettie, Ida, and Peter Burgett, herein appointed, and it appearing to the court that due and legal process of the pendency of this suit and of the filing of the bill herein had been had upon defendants, Peter L. Burgett, as administrator of the estate of Peter N. Burgett, deceased, and as guardian of said infant defendants, Bettie, Ida, and Peter Burgett, children and heirs at law of the said Peter N. Burgett and Elizabeth G. Burgett, both now deceased, in the way and manner by law required, as appears and as shown by the return of the sheriff of the county in the summons issued herein and filed."

It is insisted that there could be no valid service upon the infant defendants unless their names had been included in the summons as defendants. The omission to name them in the summons as defendants was doubtless a clerical error. The summons was amendable: *Galbreath v. Mitchell*, 32 Ark. 278; *Richardson v. Hickman*, 32 Ark. 407; *Martin v. Godwin*, 34 Ark. 682. "Where suit is defective in a matter that is amendable, it will be considered as amended when collaterally questioned": *Whiting v. Beebe*, 12 Ark. 421.

That the infant defendants were notified of the pendency of the suit against them by service of a copy of the summons that was issued in that cause (a copy of which, with the return thereon, appears in the record) upon each of them is

apparent: See *McNutt v. State*, 48 Ark. 33. The Ferguson and Hampson decree is not void.

There were in the complaint three or four other pieces of land not included in this decree. We are unable to find that appellants show title to or right to possession of either of these pieces, save the north half of fractional section 7, three hundred and twenty and forty-four one-hundredth acres, in township 4 north, range 8 east. An undivided half interest in this, with other lands, was purchased by Joel Higgins, executor, by Mrs. E. G. Burgett, under whose will appellants claim title. Afterwards, and while Mrs. Elizabeth G. Burgett still owned her undivided one-half interest, the tract was sold on the eleventh day of March, 1867, by the sheriff of Crittenden county, for the taxes of 1865-1866, and bought by J. M. Terry, who received a certificate of purchase for the same, and, after the expiration of the time allowed by law for redemption had expired, assigned said certificate of purchase to Mrs. E. G. Burgett, upon which a deed was made to her as assignee of Terry, and acknowledged February 16, 1871. The deed bears date June 28, 1860, which is evidently a mistake, probably made in copying. There is no objection made to this deed, except that it is said that the land was assessed to residents, and sold, as the lands of nonresidents are required to be sold, for taxes. The tax deed recites that the land was assessed to Higgins and Randall, nonresidents. So this objection falls.

It is also objected that, as Mrs. Elizabeth G. Burgett had a deed for and claimed an undivided interest of one-half in the land at the time of the tax sale, she, as tenant in common with the owner of the other half, was obliged to pay the taxes, and could not suffer the land to sell for taxes, and purchase her cotenant's interest, and thereby get a title to it. It is very true she could not, against her cotenant. But there is no reason why she could not thus acquire title as against strangers to whom she stood in no fiduciary relation. If her cotenant does not complain, a stranger, to whom she stands in no relation of trust or confidence, cannot. We see no reason why the appellant's title to this tract is not good, unless their right of action was barred when their suit was begun.

This suit was brought on the sixteenth day of November, 1886. The appellant, Bettie Burgett, was born December 28, 1862. Peter Burgett, one of the appellants, was born July 22, 1866, and Ida W. Burgett, another one of the appellants, was born March 20, 1869. It follows, therefore, that Bettie Bur-

gett's right of action was barred before the suit was brought. The right of action of the appellants, Peter L. and Ida W. Burgett, was not barred when this suit was brought. To avoid the statute, the appellants say that they were citizens of Mississippi, where the period of majority for females is the age of twenty-one years; but we understand that questions arising upon the statute of limitations must be settled according to the law of the forum.

It is also contended by the appellants that the appellee's intestate, Williford, entered a lease, which was not produced, but said to be lost, as to the existence and contents of which some parol evidence was heard by the court. The court determined adversely to the appellants, and we will not disturb the finding. The evidence as to this lease was not satisfactory.

There were some errors made in the Ferguson and Hampson decree, in describing some of the land in the wrong township, which are unimportant, as the pleadings show what was intended. They were described in the complaint, which the decree followed. It follows, therefore, that the judgment of the Crittenden circuit court must be affirmed, except as to the one-third interest each of Peter L. and Ida W. Burgett in said north one-half furlong, section 7, township 4 north, range 8 east, in Crittenden county. As to the said Peter L. and Ida W. Burgett, the judgment is reversed, and remanded for a new trial, so far as it relates to their one-third interest each in the said north one-half of furlong, section 7, township 4 north, range 8 east.

INFANTS—CONFLICT OF LAWS RELATING TO THE MAJORITY OF.—This question is thoroughly discussed in a monographic note to *Barrera v. Alpuente*, 17 Am. Dec. 180-183.

COTENANCY—RIGHTS OF COTENANTS DEALING WITH STRANGERS.—A tenant in common may recover the whole estate against a stranger: *McFarland v. Stone*, 17 Vt. 165; 44 Am. Dec. 325; and a purchase made by one not then a cotenant does not inure to the benefit of those with whom he afterwards becomes a cotenant: *Sneed v. Atherton*, 6 Dana, 276; 32 Am. Dec. 70.

HOFFMAN v. McFADDEN.

[56 ARKANSAS, 217.]

MECHANIC'S LIEN ON THE PROPERTY OF MARRIED WOMEN.—Under a statute authorizing a married woman to hold, devise, bequeath, and convey her property, real and personal, the same as if she were a *feme sole*, she may enter into a contract for its improvement, and such contract may be the basis of a mechanic's lien for labor and materials.

MARRIED WOMEN—A HUSBAND MAY BECOME THE AGENT OF HIS WIFE TO MAKE A CONTRACT FOR HER FOR THE IMPROVEMENT of her real property, but his authority to so act is not implied from the marital relation, nor from the mere fact that he occupied, or managed and controlled, her real estate.

A MARRIED WOMAN'S PROPERTY IS NOT SUBJECT TO A MECHANIC'S LIEN THOUGH the building is located within forty feet of the dwelling occupied by her and her husband, and she witnessed its construction and progress, and gave some direction to the carpenters, if she showed no more interest in the improvement than a wife would take in a building on land belonging to her husband, and the contract for the work was made with him, and the materials procured on his order, and, for aught that appears to the contrary, were sold on his personal credit, and she did not in fact authorize him to act as her agent, was not consulted about the contract, and had no knowledge of its terms.

W. P. and A. B. Grace, for the appellant.

White and Woolridge, and W S. McCain, for the appellee.

MANSFIELD, J. This action was brought to enforce a lien claimed by the plaintiff, McFadden, upon a house and lot belonging to the defendant, Mrs. A. C. Hoffman, for the price of materials furnished by the plaintiff and used in the erection of the house. The lot is the defendant's separate property, and the complaint alleges that the materials were purchased by Ed Hoffman, her husband, and that in obtaining them he acted as her agent. The answer denies that the husband of the defendant was her agent, or that he purchased the materials for her or with her consent; and it alleges that the house was erected against her express objection. The action was brought at law, but upon the plaintiff's motion was transferred to the equity docket. The decree of the chancellor was in favor of the plaintiff, and the defendant has appealed.

Under the statute of this state creating a lien for work done or materials furnished in making improvements on real property, the lien exists only where the labor is performed, or the materials supplied, under a contract, express or implied, with the owner of the land improved, or with "his agent, trustee,

contractor, or subcontractor": Mansfield's Digest, sec. 4402. The terms of the act import no intention to create a lien in the absence of such contract, and there is no decision of this court giving the statute, by construction, a wider meaning than its language implies: *Rogers v. Phillips*, 8 Ark. 366; 47 Am. Dec. 727. The views as to the origin of a material-man's lien, expressed by Judge Walker in *Cohn v. Hager*, 30 Ark. 25, and referred to in the argument, go no further than to indicate an opinion that the lien may be asserted, although the materials are not furnished under a contract with the land-owner, if they are supplied under an agreement with his contractor.

In *Rogers v. Phillips*, 8 Ark. 366, 47 Am. Dec. 727, it was decided that a married woman could not enter into a contract such as would subject her property to a mechanic's lien; but since the time of that decision a married woman has been empowered by the laws of this state to hold, devise, bequeath, or convey her property, real and personal, "the same as if she were a *feme sole*": Constitution 1874, art. 9, sec. 7; Mansfield's Digest, c. 104. And it has been held that while the constitutional and statutory provisions by which this change has been effected do not expressly enlarge a married woman's capacity to contract generally, the statute does, by implication, enable her to charge her separate estate: *Walker v. Jessup*, 43 Ark. 163. Under existing laws her power to convey her real property is unlimited, and it is well settled that she may mortgage it for the payment of her husband's debts: *Scott v. Ward*, 35 Ark. 480. We think she may also enter into a contract for its improvement, and that such contract may be made the basis of a mechanic's lien for labor or materials: 2 Jones on Liens, sec. 1260; *Hauptman v. Catlin*, 20 N. Y. 248; *Fowler v. Seaman*, 40 N. Y. 592.

As she may contract personally for the improvement of her estate, she can of course do so by an authorized agent; and her husband may become her agent for that purpose. But his authority to make such contract will not be implied from the marital relation, nor from the mere fact that he occupies or manages and controls her real estate: 2 Bishop's Married Women, sec. 396; 2 Jones on Liens, sec. 1264; Mechem on Agency, sec. 63; *Rudd v. Peters*, 41 Ark. 177. The laws of this state declare that the property of a married woman "shall not be subject to the debts of her husband": Const., art. 9, sec. 8; Mansfield's Digest, sec. 4624. This declaration

applies as well to a debt which he contracts for the improvement of her estate as to any other. In some of the states a mechanic's lien may be asserted on property which has been improved with the knowledge and consent of the owner, but without any contract on his part. But our statute, as we have seen, requires a contract with the owner; and this cannot be implied from the knowledge of the wife that her husband is causing her land to be improved, nor from her mere consent thereto. If he contracts as her agent, it must appear that he was authorized to do so. And his authority cannot be derived by implication from circumstances which ordinarily owe their existence solely to the marriage relation: 2 Jones on Liens, sec. 1265; *Gilman v. Disbrow*, 45 Conn. 563; Phillips on Mechanic's Liens, secs. 105, 106; and cases cited; *Conway v. Crook*, 66 Md. 291; *Fetter v. Wilson*, 12 B. Mon. 90; *Kansas City Planing Mill Co. v. Brundage*, 25 Mo. App. 268; *Jones v. Walker*, 63 N. Y. 612; 2 Bishop's Married Women, sec. 396; *Knott v. Carpenter*, 3 Head, 542; 75 Am. Dec. 779. A married woman may, by silently acquiescing in the contract of one who to her knowledge assumes to act as her agent, be estopped to deny the agency. And where the husband contracts for the improvement of his wife's property with one who believes him to be the owner, and the wife, knowing this fact, permits the work to be done without disclosing her right, it has been held that she will be estopped to set up her title in defense of an action to enforce the contractor's lien: Bigelow on Estoppel, 602, 603; 2 Jones on Liens, sec. 1264. But in this case we find in the conduct of the defendant no element of estoppel. Her husband did not assume to act as her agent, and the plaintiff knew that she was the owner of the lot on which the house was erected.

It is argued that, under section 4637 of the digest, the husband of the defendant is presumed to have contracted as her agent. The section referred to is taken from the act of December 15, 1875, and is as follows: "The fact that a married woman permits her husband to have the custody, control, and management of her separate property shall not, of itself, be sufficient evidence that she has relinquished her title to said property, but in such case the presumption shall be that the husband is acting as agent or trustee of his wife." There is much in the phraseology and provisions of the act mentioned to justify the question whether any part of it applies to real property: *Rudd v. Peters*, 41 Ark. 184. But the section quoted

has been construed to mean that the husband shall not acquire title by the wife's permission to use, control, or manage her property: *Rudd v. Peters*, 41 Ark. 184. The presumption it raises is for the protection of the wife's property against seizure for the husband's debts. It makes the latter's control or management of the property evidence only of an agency for that purpose, and not of any power to bind the property by contract. If the presumption of the statute could be resorted to for the purpose of showing the authority to make a contract by virtue of which the wife's property may be subjected to a lien, it might become an instrument for depriving her of the rights it was designed to protect. The burden of the proof, then, was on the plaintiff to establish the agency alleged in his complaint.

The building erected was located only about forty feet from a house occupied by the defendant and her husband. She witnessed the progress of the work, and gave some directions to the carpenters as to the manner of executing it. Her husband had expressed a desire to have the building so constructed that she would be pleased with it, and one of the witnessess testified that "she was present every day, and had the work done to suit her." But it is not shown that she manifested any greater interest in the improvement than a wife would usually take in the building of a house upon land belonging to her husband and put up so near to the place of her residence. Nor does it appear that there was any greater deference to her wishes in the plan of the house than is commonly shown by a husband in causing a similar work to be done at his own expense. The contract for the work was made with the husband, and the labor of the carpenters was all paid for by him. All the materials purchased from the plaintiff and others were procured on the husband's order, and, for aught that appears to the contrary, they were sold entirely on his personal credit. The defendant testified that she objected to the erection of the house for reasons which she states; and in this respect her testimony is supported by that of two other witnessess. She also states that her husband was not authorized to act as her agent, and that she was not consulted about the contract for the improvement, and had no knowledge of its terms.

Our opinion is, that on the proof adduced the plaintiff was entitled to no relief. The judgment will therefore be reversed, and the complaint dismissed.

MECHANIC'S LIEN ON SEPARATE PROPERTY OF MARRIED WOMAN.—A married woman's separate property is subject to a mechanic's lien, although the contract was made with the husband, if she is cognizant of the progress of the work and consents to its being done: *Bevan v. Thackara*, 143 Pa. St. 182; 24 Am. St. Rep. 529; *Bodey v. Thackara*, 143 Pa. St. 171; 24 Am. St. Rep. 526. This question is fully discussed in *Althen v. Tarbox*, 48 Minn. 18; 31 Am. St. Rep. 616, and note, with the cases collected. See also *Wheaton v. Trimble*, 145 Mass. 345; 1 Am. St. Rep. 463, and note.

HUSBAND AND WIFE—HUSBAND AS WIFE'S AGENT.—A husband may act as agent for his wife in transactions relating to her separate estate: *Weisbrod v. Chicago etc. Ry. Co.*, 18 Wis. 35; 86 Am. Dec. 743, and note; *Feller v. Alden*, 23 Wis. 301; 99 Am. Dec. 173; *Louisiana Nat. Bank v. Scott*, 42 La. Ann. 785; *Osborne v. Wilkes*, 108 N. C. 651; *Wronkow v. Oakley*, 133 N. Y. 505; 28 Am. St. Rep. 661, and note; *Scottish etc. Mortgage Co. v. Deas*, 35 S. C. 42; 28 Am. St. Rep. 832; *Bodey v. Thackara*, 143 Pa. St. 171; 24 Am. St. Rep. 526, and note; *Williams v. Simmons*, 79 Ga. 649. A married woman delivering a deed to her husband to enable him to borrow money, thereby authorizes him to deliver the deed to the grantee for such amount as he may see fit: *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235. To the same effect see *Reed v. Morton*, 24 Neb. 760; 8 Am. St. Rep. 247. See note to *Shivers v. Simmons*, 28 Am. Rep. 376. Upon a sale of the separate property of the wife, a payment of the purchase money to the husband binds the wife: *Douglas v. Baker*, 79 Tex. 499.

GILKERSON-SLOSS COMMISSION Co. v. SALINGER.

[56 ARKANSAS, 294.]

A MARRIED WOMAN CANNOT BECOME A PARTNER WITH HER HUSBAND in a mercantile business though the statute declares that a married woman may bargain, sell, and transfer her personal property, and carry on any trade or business on her sole and separate account, and that her earnings from her trade, business, labor, or services shall be her sole and separate property and may be invested by her in her own name, and she may alone sue and be sued in the courts of the state on account of such property, business and services.

Ewan and Thomas, and W. S. McCain, for the appellants.

W. F. Hill, for the appellee.

HUGHES, J. The question is presented by a demurrer which the court below sustained to the following complaint:

"The plaintiff, Gilkerson-Sloss Commission Company, a corporation incorporated under the laws of Missouri, doing business at St. Louis, state that Louis Salinger died on the twenty-sixth day of November, 1890; that at the time of his death, and for five years previous thereto, the defendant, Lena Salinger, was the wife of said Louis Salinger; that for some time previous to January 20, 1888, the defendant and one

William Hooker were partners in trade under the firm name of William Hooker & Co., doing a general mercantile business at Brinkley, Arkansas, and on said twentieth day of January, 1888, said William Hooker sold and transferred all his right and interest in the property and assets of said firm of William Hooker & Co. to said Louis Salinger, and thereby said Louis Salinger and the defendant, Lena Salinger, became jointly interested in the ownership of said partnership property, and said Louis and Lena then and there agreed to adopt the firm name and style of L. Salinger & Co., and to carry on and continue said mercantile business as partners with each other, and they did adopt said name and style of L. Salinger & Co., and did, pursuant to such partnership agreement, carry on such business from the said twentieth day of January, 1888, until the day of said Louis Salinger's death, to wit: November 26, 1890, and while such partnership business of L. Salinger & Co. was being carried on, to wit, during the year 1890, the plaintiff sold and delivered to L. Salinger & Co. goods, wares, and merchandise to the sum of one thousand two hundred and sixty dollars and thirty-six cents, for part of which said L. Salinger & Co. executed to plaintiff two promissory notes. An itemized statement of plaintiff's account against said L. Salinger & Co., including the amount of said notes, together with the notes, is herewith filed, showing all credits to which they are entitled, and leaving a balance of five hundred and seventy-one dollars and fifty-nine cents due and unpaid to plaintiffs. No part of said indebtedness has been paid except as credited on said statement."

Can a married woman become the partner of her husband in a mercantile business?

In many of the states it is held that she may, under statutes enlarging the powers of married women and removing in part their disabilities at common law. It is so held in *Suau v. Caffé*, 122 N. Y. 308. But the weight of authority is that she cannot. At common law the legal existence of the wife was merged in that of the husband, and they could not contract with each other.

Section 7 of article 9 of the constitution of 1874 provides that "the real and personal property of any *feme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed, or conveyed by her the

same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband."

It has been held that under this section a married woman may convey her separate estate, and acknowledge the execution of a deed for registration as a *feme sole*: *Roberts v. Wilcox*, 36 Ark. 355. She cannot, however, make an executory contract to convey land which will bind her or her heirs: *Feltner v. Tighe*, 39 Ark. 357; *Chrisman v. Partee*, 38 Ark. 31.

By section 4625 of Mansfield's Digest it is provided that "a married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name; and she may alone sue or be sued in the courts of this state, on account of the said property, business, or services."

Under similar statutes it has been held by some courts that a married woman could not become the partner of anyone in business. In *Abbott v. Jackson*, 48 Ark. 212, Judge Eakin said: "It is well settled, too, that a married woman, under such statutes as that of April 28, 1873, can form a partnership as a sole trader with a third person other than her husband." But it has not been heretofore determined expressly in this state that a married woman can or that she cannot enter into partnership with her husband.

In *Countz v. Markling*, 30 Ark. 17, it was held that a judgment by confession rendered against the husband in favor of the wife is void, and will be quashed on *certiorari*. This was on the ground of the legal unity of husband and wife and the inability of the wife to sue the husband at common law. In *Pillow v. Wade*, 31 Ark. 678, it is held that husband and wife are incapable of contracting with each other.

Under a statute similar to ours, it is held, in *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607, that a wife cannot form a partnership with her husband. See also *Lord v. Parker*, 3 Allen, 127; *Plumer v. Lord*, 5 Allen, 460; *Speier v. Opfer*, 73 Mich. 35; 16 Am. St. Rep. 556; Harris on Contracts of Married Women, sec. 618; *Mayer v. Soyster*, 30 Md. 402; *Carey v. Burruss*, 20 W. Va. 571; 43 Am. Rep. 790; *De Graum v. Jones*, 23 Fla. 83.

In view of the legal unity and identity of husband and wife

at common law, and the wife's incapacity to sue the husband at law, and the rulings of our court upon the incapacity of the wife to contract with her husband, we are of the opinion that the wife, under our statute, cannot form a partnership with her husband. As the credit in this case was given to the firm of which she could not be a member, and as she is sued as surviving partner of that firm, there can be no recovery against her in this action.

The judgment is affirmed.

JUDGE HEMINGWAY dissented from the opinion of the majority of the judges. He said that it was conceded that the law authorized a married woman to enter into business as a member of a partnership and that there was no provision of the statute authorizing her to become a partner which did not apply to a partnership with her husband as well as to a partnership with a stranger. Judge Battle joined in this dissent.

A MARRIED WOMAN CANNOT BECOME A PARTNER IN BUSINESS WITH HER HUSBAND: *Board of Trade v. Hayden*, 4 Wash. 263; 31 Am. St. Rep. 919, and extended note fully discussing the subject.

BOARD OF IMPROVEMENT v. SCHOOL DISTRICT.

[56 ARKANSAS, 354.]

AN ASSESSMENT OF PUBLIC SCHOOL PROPERTY FOR LOCAL IMPROVEMENTS IS NOT AUTHORIZED by a statute which, in general terms, requires the assessment to be upon all real property situate in the district.

W. G. Whipple, for the appellant.

Morris M. Cohn, for the appellee.

HEMINGWAY, J. This case involves the question of the liability of a public schoolhouse to assessment under the provisions of the digest with reference to "assessing property for local improvements in cities of the first class": Mansfield's Digest, sec. 825 et seq. The school board contends that the schoolhouse is not liable to such assessment, while the board of improvement contends that it is. It is conceded that the improvement district was regularly organized, and that the schoolhouse is embraced within it; the contention is that because it is a schoolhouse, belonging to a public school board, it is not liable to the assessment. The claim of exemption is placed: 1. Upon the fifth section of the sixteenth article of the constitution of 1874, which provides that "public property, used exclusively for public purposes, churches used as such, cemeteries used exclusively as such, school-buildings

and apparatus, libraries and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity," shall be exempt from taxation; and, 2. Upon the terms of the act that regulates the assessment of property for local improvements, and describes the property to be assessed simply as "all the real property situated in the district."

We have no difficulty in disposing of the first ground relied upon. The rule established by a consensus of authorities—text-writers and adjudged cases—is that the constitutional exemption refers alone to taxes for general purposes of revenue, and has no reference to special taxes or assessments for local improvements. If the case of *Peay v. Little Rock*, 32 Ark. 31, is an authority against it, that of *Davis v. Gaines*, 48 Ark. 370, is in support of it; and if there be any conflict between these cases, we approve the latter, as right upon principle and in line with the authorities: *Cooley on Taxation*, 2d ed., 207, and cases cited.

As to the second ground relied upon to sustain the claim of exemption, we find the authorities divided. The argument in favor of the exemption is that as the statute, in defining the property to be assessed, does not expressly mention public property or include it by any necessary implication, the presumption is that it was not intended to be assessed.

A leading case in support of the contention is *Worcester Co. v. Worcester*, 116 Mass. 193; 17 Am. Rep. 159. The question there arose upon the liability of a courthouse to assessment by a sewer district. The court held that, although it was not exempt by the statute, which had reference to general taxes only, it was free from taxation; because, being public property, acquired by public funds, managed by public authorities, constituting an instrumentality for the performance of public functions, it was not to be deemed a subject of taxation, either general or special, unless the intent of the legislature to render it so clearly appeared.

In the case of the *City of Atlanta v. First Presbyterian Church*, 86 Ga. 730, the question of the liability of a church to assessment was presented to the supreme court of Georgia. The statute provided that all real estate abutting on the street improved should be assessed, and the contention was that churches were expressly exempted from taxation, and that if the exemption applied to general taxes only, it implied an exemption from special taxes or assessments. The court

held that the statutory exemption furnished no immunity from the special taxes, and that there was no implied exemption in favor of churches; but in discussing the latter question Judge Bleckley said: "We can be morally certain that they (the terms of the act providing for the assessment) comprehend more than the legislature intended they should; for they cover by their letter public as well as private property, and subject the whole alike to assessment, lien, levy, and sale. That the public property of the United States, the state, county, or the city, was intended to be dealt with thus is so improbable that we can have no hesitation in holding that an implied exception as to all public property can and should be ingrafted upon the act by construction."

In the case of the *County Commissioners etc. v. Board of Managers*, 62 Md. 127, the question arose upon the assessment of property held by the board of managers of the state hospital for street construction. The court said "that to bind the land of the state in any way that may divest it from the state, or destroy or impair one of its established agencies or means for carrying on its functions, the legislature must unequivocally give its sanction. . . . It is not material whether the state's property may be taken from it by a tax in the nature of assessment for benefits or in some other way. The danger exists of taking that which belongs to and is essential to the state; and it cannot be exposed to this danger without its direct sanction."

A like conclusion has been reached by other courts: *City of Toledo v. Board of Education*, 48 Ohio St. 87; *Edgerton v. Huntington School Tp.*, 126 Ind. 261; *State v. Hartford*, 50 Conn. 89; 47 Am. Rep. 622.

Although a special tax or assessment is not usually embraced within the meaning of the general term "tax," the rule under which public property is presumed to be exempt from one justifies the presumption as to the other. In speaking of the latter, Judge Cooley says: "Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for governmental purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would

be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact": Cooley on Taxation, 2d ed., 172.

It is uniformly conceded that this rule is correct when applied to general taxation; the reason sometimes given for it is the improbability that the legislature would levy a tax upon that which results from a tax, and must be replaced by a tax, and which is used for governmental purposes; another reason is found in the rule of statutory construction which presumes that the legislature never intends to affect or transfer any governmental right or property, unless it expresses its intention to do so in explicit terms or makes the inference irresistible. Whichever be the true reason of the rule, it is well settled; and we think it should apply alike to special, and to general, tax laws.

If it be argued that the reasoning upon which the rule is placed does not apply to special taxes for local improvements, because the levy would fall upon one public body for the benefit of a smaller one, or because the entire school district would pay the tax while the small improvement district must bear the loss from the exemption, the answer is that the same is the case with regard to general taxes. Exemption of the state house and other state institutions relieves every taxable subject in the state from the burden of taxation, but it deprives the particular county or school district in which they are situated of the entire county or school tax; and so the exemption of county property from state taxes benefits the county only, and deprives the entire state of revenue; still, in all such cases, it is held that exemption is implied wherever liability is not expressed or necessarily implied. If the disparity of burden and benefit does not prevent the operation of the rule as to general taxes, we see no reason why it should as to special assessments. See Endlich on Interpretation of Statutes, secs. 161-163; Sedg. on Const., Stat. 28, 337, 521; Suth. Stat. Const. 421; *Galveston Wharf*

Co. v. Galveston, 63 Tex. 14; *Rochester v. Rush*, 80 N. Y. 302; *People v. Brooklyn Assessors*, 111 N. Y. 505; *Jones v. Tatham*, 20 Pa. St. 398; *Directors of Poor v. School Directors*, 42 Pa. St. 21; 2 Dillon's Municipal Corporations, 4th ed., sec. 773; *People v. Doe*, 36 Cal. 220; *West Hartford v. Board of Commrs.* 44 Conn. 360.

It is argued that, upon the authorities, exemptions of public property from local assessments is denied, and cases to sustain the argument are to be found, decided by high and learned courts: See *St. Louis Public School v. St. Louis*, 26 Mo. 468; *Sioux City v. Independent School Dist.*, 55 Iowa, 150; *McLean Co. v. Bloomington*, 106 Ill. 209; *Adams Co. v. Quincy*, 130 Ill. 566.

But in our opinion they are based upon error. The reason upon which they rest, as stated by the Supreme Court of Iowa, is that "taxation is the rule and exemption the exception," and that statutes under which exceptions are claimed must be strictly construed. To sustain this, *Cooley* is cited. The same reason is given by the Supreme Court of Illinois, and Dillon is cited. Both courts seem to have overlooked the fact that the authors in the citations made were considering the subject with reference to private property, and had stated the rule with reference to public property to be that exemptions would be implied unless otherwise expressed: *Cooley on Taxation*, 2d ed., 172; 2 Dillon's Municipal Corporations, 4th ed., sec. 743.

It is argued that even if public property is exempt, the exemption does not extend to the property of public school districts, inasmuch as they are not, strictly speaking, municipal corporations, and education is not a governmental function. The constitution provides that the state shall ever maintain free public schools, and in performing this duty it exercises a function strictly public and governmental. It created school districts and imposed upon them in part this duty, and in order to discharge it they own schoolhouses. They have no other duty than to perform for the state this public function, and only that they may do it is the house held. The state may abolish them, take the property, and undertake directly or through other agencies this public function. The means of controlling the property would thereby be changed, but its use would be unchanged; and there is nothing in the policy of the law to exempt the property while held and controlled by the state, which would deny the ex-

emption while held by the state's agent and used in the performance of its duties: *Green v. United States*, 9 Wall. 655, and authorities above cited.

There is nothing in the act to require the inference that it was intended to embrace public property held by the government, the state or any of the state's subordinate agencies and used for public purposes. It could not include the first, and this the legislature no doubt knew; but there is as much reason to suppose that it intended to include the property of the government as that of the state. An exception must be implied as to the property of the government; and as no appropriate remedy is provided for collecting sums due from the state or any of its agencies, there is no inference that the legislature intended to include such property, and the presumption is that it was to be exempted.

Affirmed.

COCKRILL, C. J., dissented.

TAXATION OF PUBLIC PROPERTY.—The property of a municipality, acquired and held for governmental uses and used for public purposes is not subject to taxation unless specially made so: *People v. Board of Assessors*, 111 N. Y. 505; *Meridian v. Phillips*, 65 Miss. 362. The land of a county used for public purposes is exempt from all taxation whether imposed for public purposes or local improvement of a public nature: *Inhabitants v. Mayor*, 116 Mass. 193; 17 Am. Rep. 159, and note; *Black v. Sherwood*, 84 Va. 906. County school lands owned by the county are not subject to taxation whether leased or not: *Daugherty v. Thompson*, 71 Tex. 192. Property, the title to which is held by the United States for whatever purpose, is exempt from state taxation: *People v. United States*, 93 Ill. 30; 34 Am. Rep. 155.

For note on assessment and taxation of public property, see *Board of Commrs. v. Ottawa*, 33 Am. St. Rep. 400-413.

RIGGIN v. HILLIARD.

[56 ARKANSAS, 476.]

SUBROGATION.—The loan of money to a debtor to discharge his obligation does not entitle the lender to be subrogated to securities which the creditor held for the enforcement of the obligation.

A COUNTY IS NOT SUBJECT TO GARNISHMENT.

A CREDITOR'S BILL MAY BE SUSTAINED TO REACH MONEY DUE TO THE DEFENDANT FROM A COUNTY or other municipal corporation not subject to garnishment. If the court can ascertain that no inconvenience will result to the public, it will require the defendant to assign his demand to a receiver to be collected for the benefit of the complainant.

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SURT in the nature of a creditor's bill to reach moneys due the defendant, Hilliard, upon a written contract with the county judge of Jefferson county, for the reconstructing of a courthouse. The contract was, by its terms, not assignable by Hilliard. He made a subcontract with W. F. Jones to do the carpenter work. Plaintiff, at Hilliard's request, furnished part of the materials used by Jones. For part of these Hilliard paid, but a balance of four hundred and nineteen dollars and forty cents remained unpaid. The work on the courthouse was entirely completed, and Hilliard was alleged to be insolvent. The trial court at first enjoined the county judge from paying the money to Hilliard, but afterwards dissolved the injunction, sustained a demurrer to plaintiff's complaint and denied him all relief. Thereupon he appealed.

W. T. Woolridge and W. M. Harrison, and Met L. Jones, for the appellant.

N. T. White, and Crawford and Taylor, for the appellee.

COCKRILL, C. J. It is conceded that the courthouse is exempt from the operation of the statute governing mechanic's liens, and that the statute does not create any claim or lien in appellant's favor upon the fund which the county has set apart to pay for the repairs.

The contention is that the appellant shows a right to equitable subrogation to the right of Hilliard to proceed against the county for the collection of an amount equal to his claim against Hilliard. But the relation of the parties to each other is not such as to invoke the application of that doctrine.

The appellant, according to his allegations, has sold to the appellee, upon his personal credit alone, materials to be used in repairing a courthouse.

In the absence of a statute giving him a lien, he is in no better condition than if he had loaned the contractor money to carry out his contract with the county in making the repairs; but it is settled that the loan of money to a debtor to discharge his obligation does not entitle the lender to be subrogated to securities which the creditor held for the enforcement of the obligation: *Rodman v. Sanders*, 44 Ark. 504; *Kline v. Ragland*, 47 Ark. 118; *Steamboat White v. Levy*, 10 Ark. 411; Sheldon on Subrogation, sec. 243.

If there had been an agreement between the parties that the plaintiff should receive pay for his materials from the county out of the fund due Hilliard, the contractor, for repairs, or if

the agreement could be implied from the conduct of the parties, the plaintiff would be entitled to subrogation by reason of his contract; but that would be conventional subrogation, which is more nearly akin to assignment than to subrogation by operation of law. There is no allegation in the complaint that there was an agreement between the appellant and Hilliard for subrogation. No foundation is laid therefore for conventional subrogation.

The claim of one whose materials are used in the construction or repair of a building is more meritorious than that of the contractor who has used the materials in the construction and refuses to pay for them. Such claims have preference in general by statute. It would doubtless work an equitable result if the legislature would make claims for materials and labor furnished in the erection or repair of public buildings a lien upon the fund to be paid therefor, superior to the claim of the contractor. Laborers and material-men could then divert the course of the payments, which would otherwise go to the contractors, into their own hands, by virtue of the statutory subrogation. But where there is no legislation and no contract to affect the status of the parties, the simple relation of debtor and creditor exists between the material-man and contractor, and the former can resort only to the remedies common to such creditors for the collection of their debts.

The question, then is, Does the plaintiff, a simple contract creditor, state facts entitling him to equitable relief against his debtor?

The county is not sued. It is conceded that the statute does not authorize suit in the circuit court against a county, and that it could not be made a party to this suit. The complaint alleges that the materials were furnished to Hilliard through his agent, upon Hilliard's express promise to pay for them, and that the account is due and unpaid. That was a statement of a cause of action for a personal judgment against Hilliard. It alleges also that Hilliard is insolvent, that the county is indebted to him, and, in effect, that unless he gets his pay out of the amount due by the county, nothing can be collected.

A court of law could not reach the debt due by the county, because a county is not subject to garnishment: *Boone Co. v. Keck*, 31 Ark. 387.

It is the peculiar province of equity to reach interests of a debtor which cannot be seized under legal process, when its aid

is invoked by a judgment creditor who has exhausted his legal remedies without effect. But the act of March 31, 1887, dispenses with the necessity of a previous judgment as a condition to obtaining equitable relief under a creditor's bill. It provides that "in suits to set aside fraudulent conveyances, and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such cases insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief": Acts, 1887, 193. The object of the act was to dispense with the useless delay and expense incident to obtaining a judgment, which it is known in advance will prove fruitless. Courts of equity had already begun to relax the rule requiring a judgment and execution, and return of *nulla bona* to show that the legal remedy was inadequate. The statute runs in that line; it is remedial, and should receive a liberal construction to effect the object designed by it.

Every equitable proceeding wherein a remedy is devised to apply the debt of a third person to the extinguishment of the plaintiff's demand against his debtor, is a suit for an equitable garnishment. That is the object of the plaintiff's suit; and as the complaint alleges that the debtor is insolvent, and that no relief could be obtained at law, the statute dispenses with the necessity of a previous judgment. Taking the allegations of the complaint as true, the plaintiff has laid the foundation for a creditor's suit, and the question is, can the debt due by the county to the plaintiff's debtor be subjected to the payment of his demand?

The case of *Boone Co. v. Keck*, 31 Ark. 387, holds that public policy forbids that counties should be subjected to the process of garnishment, unless the legislature certainly evinces the intention to grant the use of the process against them. It is there ruled, as we have seen, that our statute does not extend the remedy against counties. The reasons of policy ordinarily assigned for withholding garnishment process against counties and other municipal corporations are, "the inconvenience and impolicy of interfering with the operations of municipal bodies, by drawing them into controversies with which they have no concern, and diverting the public moneys from the channel in which . . . they are required to flow": Drake on Attachments, sec. 516.

The argument as to the impolicy of drawing the county

into a litigation with which it has no concern has no application in this case, because there is no litigation against the county. It is not made a party to the suit. But the objection to diverting the public funds from the channel to which they have been turned by public authority exists when the cause arises in equity just as it does at law. But the remedies of equity are not fixed and unbending like the legal process of garnishment; and if the court can ascertain that no inconvenience can result to the public by its interference with the corporation's right to pay the debt directly to its debtor, there is nothing to prevent the court from doing so.

In Minnesota, as in this state, a municipal corporation cannot be reached by the process of garnishment, but it is there held that, in a suit like this, a defendant who is the county's creditor may be compelled to assign his demand against the county to a receiver to be collected and applied to the satisfaction of the plaintiff's demand, where no reason of policy intervenes: *Knight v. Nash*, 22 Minn. 452.

The supreme court of Georgia intimate, but do not decide, that they would approve the practice under like circumstances: *Dotterer v. Bowe*, 84 Ga. 769.

A similar, though not identical, practice was approved by the supreme court of the United States in the case of *Smith v. Bourbon Co.*, 127 U. S. 105.

In Missouri the statute expressly prohibited the use of the writ of garnishment against a municipal corporation, but the supreme court of the state held that it did not protect the debt against a creditor's suit in equity to apply it to the payment of his demand: *Pendleton v. Perkins*, 49 Mo. 565. The same conclusion was reached in *Speed v. Brown*, 10 B. Mon. 108.

In the case of the *Bank of Tennessee v. Dibrell*, 3 Sneed, 879, a creditor's bill seeking to subject the salary of a state official to the payment of his debts was disallowed. But the case is in harmony with the principle underlying those already cited. The reason given by the court for the decision is, that "the functions of government might be suspended" by the loss of efficient servants if the state were not permitted to pay salaries directly to her officers: See *McMeekin v. State*, 9 Ark. 553; *Roeller v. Ames*, 83 Minn. 132. The remedy is allowed in no case where it is adjudged that the public will be injuriously affected.

It follows that relief should be granted to the plaintiff unless public policy intervenes in some way.

The complaint alleges that the debt is due upon a contract to repair a courthouse. The courts commonly concur in holding that public policy forbids any interference between the county and its contractor under such circumstances if the work is still in progress, for the interference would tend to retard the occupancy of the building. But here the complaint alleges that the work has been completed. There is no longer any public interest to be subserved by withholding payment from the contractor, and no reason for withholding the debt from the reach of the remedy in this sort of proceeding. Judge Dillon goes further, and expresses the opinion that in such a case the ordinary process of garnishment should be allowed against a municipal corporation: 1 Dillon's Municipal Corporations, sec. 101; *City of Laredo v. Nalle*, 65 Tex. 359. But the case of *Boone Co. v. Keck*, 31 Ark. 387, is opposed to the view that the legal process of garnishment can be used against a county in any case. For the same reason, it was held in that case that a county could not be made to respond to a creditor's suit supplementary to execution. Nothing else was involved or determined in the case. It was a suit directly against the county; the plaintiff's judgment debtor was not a party to it, and the only relief asked was against the county. In the case at bar the plaintiff's debtor is the party against whom relief is sought, and the county is not sued. Therein lies the cardinal difference between the cases.

The complaint states a cause of action against Hilliard, and shows a right in the plaintiff to subject the debt due by the county to the satisfaction of his demand. That can be accomplished under proper orders of the court, as by a sale or compulsory assignment of the debt for the purpose of applying the proceeds to the satisfaction of any judgment which the plaintiff is entitled to recover.

The demurrer ought therefore to have been overruled. The judgment will be reversed, and the cause remanded with directions to overrule the demurrer.

It is so ordered.

SUBROGATION—RIGHTS OF VOLUNTEERS.—To justify the application of the doctrine of subrogation the person paying the debt must, in doing so, have acted under the compulsion of saving himself from loss and not as a mere volunteer: *Opp v. Ward*, 125 Ind. 241; 21 Am. St. Rep. 220, and note; *Burns v. Lindsey*, 95 Mo. 250; 6 Am. St. Rep. 4., and note. Where money is loaned to a corporation in the ordinary course of business, without any agree-

ment as to the use to be made of it, and is afterwards paid out to laborers and supply-men, the persons making such a loan are not entitled to be subrogated to the claims paid with the money loaned as against mortgagees of the corporation: *Fidelity Ins. etc. Co. v. Shenandoah etc. R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858, but one who pays money for the purpose of discharging a lien on real property is not a volunteer and may be subrogated to the lien thus discharged: *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566, and note. One who advances money to pay off a lien to protect his own interests is not a volunteer: *Backer v. Pyne*, 130 Ind. 288; 30 Am. St. Rep. 231, and note; *Ryburn v. Mitchell*, 106 Mo. 365; 27 Am. St. Rep. 350, and note.

GARNISHMENT—MUNICIPAL CORPORATIONS WHETHER SUBJECT TO.—As to the liability of municipal corporations to garnishment, see note to *Waterbury v. Board of Commissioners*, 24 Am. St. Rep. 73; *Born v. Williams*, 81 Ga. 796; *Merrell v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785, and note; *Mervin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204, and note; *Burnham v. Fond du Lac*, 15 Wis. 193; 82 Am. Dec. 668; *Waterbury v. Board of Commissioners*, 10 Mont. 515; 24 Am. St. Rep. 67, affirmed in *Whalen v. Harrison*, 11 Mont. 63; see also the extended note to *Divine v. Harvie*, 18 Am. Dec. 200.

BOND v. MONTGOMERY.

[56 ARKANSAS, 563.]

HOESTEAD.—AN ORDER OF A PROBATE COURT DIRECTING THE SALE OF THE HOESTEAD OF A DECEDENT IS VOID if made during the minority of his children, or while his widow is unmarried and has not abandoned the homestead, nor acquired any other in her own right.

SUBROGATION—VOID JUDICIAL SALES.—Purchasers under a void judicial sale are entitled to be subrogated to the rights of the creditors whose claims were discharged by the proceeds of such sale.

JUDICIAL SALES.—THE MAXIM OF CAVEAT EMPTOR does not apply to a judicial sale where the defect in the title of the purchaser is occasioned by some irregularity in the proceedings depriving them of the power to divest the title held by the defendant.

CONTRACT—PARTIES IN PARI DELICTO.—If a contract, otherwise unobjectionable, is prohibited by a statute which imposes a penalty upon one of the parties only, the other party is not in *pari delicto*, and he, upon disaffirming the contract, may recover against the party upon whom the penalty is imposed for any money or property which has been advanced upon such contract.

JUDICIAL SALES.—A PURCHASER AT AN ADMINISTRATOR'S SALE OF A HOME-STEAD IS NOT IN PARI DELICTO with the administrator and therefore excluded from the benefit of the right to be subrogated to the claims of creditors, on the ground that the sale by the administrator was, under the circumstances, forbidden by statute and made punishable as a misdemeanor, nor does the fact that the purchaser acted as one of the appraisers of the homestead preparatory to its sale deprive him of his right to subrogation.

JUDICIAL SALES.—A PURCHASER AT A VOID JUDICIAL SALE is not entitled to be subrogated to the claims of creditors, unless it appears that the proceeds of the sale were appropriated to the payment of such claims.

SUBROGATION—PARTIES.—One who sues to be subrogated to the rights of creditors of a decedent, on the ground that he has purchased property at a void judicial sale made to raise money to pay their claims, must make them parties defendant.

Price and Parker, for the appellants.

Sanders and Watkins, for the appellee.

BATTLE, J. Under the constitutions of 1868 and 1874 the probate court had and has no jurisdiction to order the sale of a homestead of a deceased person for the payment of his debts, during the minority of his children, or so long as his widow remains unmarried, or does not abandon it, or shall not be the owner of a homestead in her own right. During this time the homestead is exempt from sale for the payment of the debts of the deceased owner. The order of sale in this case was, therefore, an absolute nullity: *McCloy v. Arnett*, 47 Ark. 445; *Nichols v. Shearon*, 49 Ark. 75; *Stayton v. Halpern*, 50 Ark. 329.

The circuit court and the parties treated the answer of appellee as a cross-complaint. Appellee offered no resistance to the prayer of appellant's petition, but conceded all they asked. All he asked was to be subrogated to the rights of the creditors of the estate of Robert E. Bond, deceased. Is he entitled to be subrogated to such rights? is the principal question presented for our decision.

Upon the right of purchasers at void execution or judicial sales to subrogation to the rights of creditors to the payment of whose claims the purchase money paid by them has been appropriated courts are not agreed. Many consider them as volunteers acting without compulsion and for no purpose of protecting any interest of their own, and under a mistake of law, and therefore not entitled to the protection of courts of equity. On the other hand, others hold that the doctrine of subrogation rests upon the natural principles of equity and justice; that purchasers at such sales who are entitled to the benefit of subrogation are not volunteers; that they purchase at a sale made under the coercive process of law, under the honest belief that they are getting the property sold, and their money is actually applied to the benefit of the owner in paying his debts or removing charges or liens upon his property; and that it would be in the highest degree inequitable and

against good conscience to permit the owners, the administrators or creditors, as the case may be, to hold or enjoy at the same time the benefit of the property sold and the money of the purchaser without recompense, and that, in order to prevent this injustice and wrong, they should be subrogated to the rights of the creditors, or to the benefit of the liens or charges, to the payment of whom or which their money has been applied. According to the latter view, it is the belief of the purchaser that he is getting the property sold, and the actual application of the money to the benefit of the owner in paying his debts in removing a charge or lien on his estate, which constitute the equity. There is no conflict between this view and the maxim of *caveat emptor*. That maxim applies where there is a failure of title, "because of a want of ownership in the property by the defendant in the execution or in the intestate," or testator, "but it does not apply to the defects in the title of the purchaser occasioned by a failure of the sale to pass the title of the defendant's intestate," or testator. The latter view has been adopted by this court, and is sustained by the decided preponderance of authority: *Waggener v. Lyles*, 29 Ark. 47; *Nichols v. Shearon*, 49 Ark. 75; *Meher v. Cole*, 50 Ark. 361; 7 Am. St. Rep. 101; *McGee v. Wallis*, 57 Miss. 638; 34 Am. Rep. 484; *McLaughlin v. Daniel*, 8 Dana, 182; *Bright v. Boyd*, 1 Story, 478, 2 Story, 605; *Scott v. Dunn*, 1 Dev. & B. Eq. 425; 30 Am. Dec. 174; *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 164; 77 Am. Dec. 557; *Blodgett v. Hitt*, 29 Wis. 182; *Hatcher v. Briggs*, 6 Or. 31; *Short v. Porter*, 44 Miss. 533, 538; *Crippen v. Chappel*, 35 Kan. 495; 57 Am. Rep. 187; *Levy v. Martin*, 48 Wis. 198; Freeman on Void Judicial Sales, secs. 51-54, and cases cited.

But it is said that the administrator committed a misdemeanor by undertaking to sell the homestead, and that the appellee was a *particeps criminis*, and is not entitled to be subrogated to the rights of creditors. To sustain this contention, an act of the general assembly, numbered 105, and approved April 25, 1873, is relied on. Section 1 of that act provides that whenever any resident of this state shall die leaving a widow or children who may desire to claim the benefit of the homestead of the deceased, she or they, as the case may be, shall file, with the clerk of the probate court of the county in which the homestead is situated, an accurate description of the land so claimed, and apply to have the same reserved from sale; and section 2 provides that it shall be

the duty of the clerk, immediately after the filing of the application, to enter upon the records of said court that said homestead has been duly reserved from sale upon the application of such claimant or claimants. Section 9 then provides that when these sections have been complied with by the parties claimant, "any administrator or executor of the estate of the deceased who shall assume the possession of, or in any manner disturb the widow or children of the deceased in the enjoyment of, said homestead, or undertake to sell the same, shall be guilty of a high misdemeanor, and shall, upon conviction, be imprisoned in the county jail for a term not less than one nor more than two months, and shall be fined in any sum not less than one hundred nor more than five hundred dollars." The first two sections are in Mansfield's Digest, but the ninth is omitted. Finding no constitutional provision or statute repealing any of them, we think that all of them are still in force. This being true, is appellee entitled to be subrogated to the rights of creditors who have received the purchase money, to the extent that they have thereby been paid?

Appellants insist that he is not, and cite *Martin v. Hodge*, 47 Ark. 378, 383, 58 Am. Rep. 763, to support their contention. In that case this court, using the language of Lord Mansfield in *Holman v. Johnson*, 1 Cowp. 341, said: "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there, the court says, he has no right to be assisted." In that case the court laid down the rule in cases when the principal party to the immoral or illegal act or offense seeks relief. That case was an action of replevin, in which the defendant sought to prevent a recovery by the plaintiff because he had violated the statute making it criminal to sell lottery tickets in this state, and because the defendant, as he contended, had come into the possession of the property in controversy by reason of such violation. The court did not undertake, in that action, to lay down any rule to determine in all cases when a party to an illegal or immoral act can recover in an action brought in disaffirmance of such acts. In that case the court said: "The test to determine whether a plaintiff is entitled to recover in an action like this or not is his ability to establish his case without any aid from an illegal transac-

tion." The facts, the authorities cited, and the language of the court in that case, clearly show that it only undertook to define the rule governing such cases, and no others.

The rule as stated in *Martin v. Hodge*, 47 Ark. 378, 383, 58 Am. Rep. 763, is correct; that is to say, whenever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, *in pari delicto*, courts will not aid either party by enforcing or setting aside the contract or obligation while it is executory, or by enabling him to recover the title to property which he has parted with by its means. But "where a contract, otherwise unobjectionable, is prohibited by a statute which imposes a penalty upon one of the parties only, the other party is not *in pari delicto*, and, upon disaffirming the contract, may recover as upon an implied *assumpsit* against the party upon whom the penalty is imposed for any money or property which has been advanced upon such contract." This is not only consonant to principles of sound policy and justice, but is sustained by the authorities: *Curtis v. Leavitt*, 15 N. Y. 9; *Tracy v. Talmage*, 14 N. Y. 162, 181; 67 Am. Dec. 132; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *White v. Franklin Bank*, 22 Pick. 181, 186, 188; *Lowell v. Boston etc. R. R. Corp.*, 23 Pick. 24, 81, 82; 34 Am. Dec. 33; *Walan v. Kerby*, 99 Mass. 1; *Thomas v. City of Richmond*, 12 Wall. 349; *Parkersburg v. Brown*, 106 U. S. 487, 503; *Prescott v. Norris*, 32 N. H. 101; *Lester v. Howard Bank*, 33 Md. 558; 3 Am. Rep. 211; Pomeroy's Eq. Jur., sec. 403, and cases cited; Bishop on Contracts, ed. of 1887, secs. 627, 628, and cases cited.

Oneida Bank v. Ontario Bank, 21 N. Y. 490, is a fair illustration of the latter rule and its reason. In that case a statute of New York declared that "no banking association or individual banker, as such, shall issue, or put in circulation, any bill or note of such association or individual banker unless the same shall be made payable on demand, and without interest," and that every violation of the statute by any officer or member of a banking association, or by any individual banker, shall be deemed and adjudged a misdemeanor, punishable by fine or imprisonment or both, in the discretion of the court having cognizance thereof. Drafts were issued by a bank to one Perry for money advanced, in violation of this statute. The question in the case was: Could Perry, who dealt with the bank, and took from it the drafts, which the statute prohibited, reject the drafts, they being void,

and recover the money or value which he advanced on receiving them? The court held that he could. Chief Justice Comstock, speaking for the court, said: "The argument for the defendant against this position rests wholly on the idea that Perry, in receiving the post-dated drafts, was as much a public offender as the bank or its officers issuing them. . . . But such were not the relations of both the parties to these transactions. Whatever there was of guilt in the issuing of the drafts, it was the creature of the statute. There is no rule of ethics or principle of the common law against the issue of time obligations by banks or bankers. The offense is therefore precisely of the nature, form, and proportions which the legislature have declared. By that authority, and that alone, the bank is prohibited from issuing, but not the dealer from receiving; and the punishment is denounced solely against the individual banker, or the officers, agents, and members of the association. The same power which created the offense has designated the criminal parties. . . . If the issuing of the drafts was prohibited, and if they were also void, Perry nevertheless had a right to demand and recover the sums of money which he actually loaned to the defendant."

A further review of the authorities is unnecessary. They are sufficiently examined in the cases cited above. Whatever doubt may have been entertained as to the latter rule, it is now well settled by authority.

The act of April 25, 1873, does not make the buying or offering to buy the homestead of a deceased person, at an administrator's or executor's sale, after it has been selected by the widow or minor children and reserved for sale, a criminal offense. The administrator or executor attempting to sell is alone subject to the penalty. He alone is declared to be the criminal by the statute creating the offense. The person assuming to be the purchaser at the pretended sale is guilty of no criminal or immoral act, and has not violated the act; and stands as though the effort to sell was not criminal in any respect; and is, therefore, according to *Nichols v. Shearon*, 49 Ark. 75, and cases cited above, entitled to be subrogated to the rights against the estate which were held by the creditors whose claims his money has paid.

It is suggested that appellee is not entitled to subrogation because he aided the administrator in making the sale by appraising the homestead, and thereby became an accomplice

in the commission of a misdemeanor. To make him an accomplice he must have assisted in the appraisement with the intent to encourage or induce the administrator to make the sale. The mere appraisement did not operate to make him an accessory to the misdemeanor committed by the administrator in undertaking to sell the homestead. The statute under which the appraisement was made provided that "before any executor or administrator should sell any lands and tenements, or any interest therein, by the order of the court, he shall have such lands and tenements appraised by three disinterested householders of the county in which the lands and tenements are situated." Such appraisers should be selected because they are not interested in the sale. The presumption is, the administrator endeavors to do his duty in the selection of them. When he selects them he has fully determined to make the sale; the order for that purpose is already made. The presumption is, he selects them because they are disinterested, and that they make the appraisement in the performance of a duty, with no intent to advise or encourage the administrator to sell or desire to control his subsequent action, and without regard to the course he may thereafter pursue in regard to the sale, they being disinterested. There is no occasion for them to appraise, if their object is to advise and encourage, as they can do so just as effectually by other means. There is no necessary connection between the two acts.

As it does not appear that appellee was, criminally, an accomplice in the effort to make the sale, it is unnecessary to consider what would have been his rights in respect to subrogation, if he had been such an accomplice.

But it nowhere appears that the purchase money paid by appellee was appropriated to the payment of the creditors. This being true, he was not entitled to subrogation; and the court erred in overruling appellant's demurrer to his answer or cross-complaint.

Appellee also failed to make the creditors, to whose rights he seeks to be subrogated, parties defendant to his cross-complaint. Such creditors were indispensable parties, and should have been made defendants: *Kyner v. Kyner*, 6 Watts, 227. Their rights were involved, and they had a right to defend them. As they were not made parties, we will not undertake to decide what the rights of appellee as to them are, under the peculiar facts of this case.

For the errors indicated the decree of the circuit court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

JUDICIAL SALES—RIGHT OF PURCHASER TO SUBROGATION WHERE SALE IS VOID.—A purchaser of land sold under a void decree is entitled, upon the disaffirmance of the sale, to be subrogated to the rights of the creditor whose valid debt his money has gone to pay: *Hull v. Hull*, 35 W. Va. 155; 29 Am. St. Rep. 800, and note; *Meher v. Cole*, 50 Ark. 361; 7 Am. St. Rep. 101, and note. See also the extended notes to *Perry v. Adams*, 2 Am. St. Rep. 328, and *Scott v. Dunn*, 30 Am. Dec. 177, where the question is thoroughly discussed.

HOMESTEAD.—Where land owned by a father, who leaves minor children, was a homestead at the time of his death, a sale thereof during their minority is void: *Kessinger v. Wilson*, 53 Ark. 400; 22 Am. St. Rep. 220, and note, with the cases collected. As against creditors, a homestead held by a widow in her deceased husband's estate does not expire until her death: *Holloway v. Holloway*, 86 Ga. 576; 22 Am. St. Rep. 484, and note. See also *Stockton Building etc. Assn. v. Chalmers*, 75 Cal. 332; 7 Am. St. Rep. 173, and note.

JUDICIAL SALES—CAVEAT EMPTOR—WHEN DOES NOT APPLY.—The maxim *caveat emptor* applies strictly to judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts, fraud, or misrepresentations: *Redd v. Dyer*, 83 Va. 331; 5 Am. St. Rep. 272; *Roberts v. Hughes*, 81 Ill. 130; 25 Am. Rep. 270; *Williams v. Glenn*, 87 Ky. 87; 12 Am. St. Rep. 461; See note to *Neal v. Gillaspy*, 26 Am. Rep. 39; also note to *McGhee v. Ellis*, 14 Am. Dec. 131.

ROTH v. HOLLAND.

[56 ARKANSAS, 633.]

LACHES IN PROCURING THE ADMINISTRATION OF THE ESTATE OF A DECEDENT MAY PRECLUDE A CREDITOR from having the real property of an estate sold to pay his debt, as where for more than twelve years after the death of the decedent (five of which were during the late civil war) no application was made for letters of administration, and the heirs had taken possession of the property and finally conveyed it to a third person. Though no statute of limitation is applicable, no unreasonable delay, either in administering or in making a sale after administration is taken, is permitted. What is an unreasonable delay must be determined by the court in its sound discretion in each case. Where it is the policy of the law that seven years should be deemed a sufficient time in which to assert a title to land it ought equally to be regarded as a sufficient time in which a creditor should take such measures as should be necessary to enforce his right to have the real estate of the decedent sold to satisfy his demands.

APPLICATION by an administrator for an order authorizing him to sell real property to pay a debt of the decedent. For more than twelve years after such death no effort was made

to procure letters of administration, nor to present claims against the estate, but, as five years of that time were during the late war, the court regarded the laches of the parties in interest as amounting to seven years only. The order having been granted, a grantee of the heirs appealed.

J. W. House and J. M. Moore, for the appellant.

Sanders and Watkins, for the appellee.

HEMINGWAY, J. On the first day of July, 1887, John G. Holland, as administrator of the estate of Mary J. Watkins, deceased, presented his petition to the probate court for leave to sell a tract of land for the payment of debts. So far as the petition disclosed, there was but one claim against the estate—a judgment rendered by the circuit court of White county in favor of Thomas J. Rogers. As to it, the petition alleges that, on the 20th of January, 1870, Rogers presented to the administrator his account for the sum, including principal and interest, of six hundred and thirty-seven dollars and fifty-nine cents; that the administrator refused to allow the account, but it was allowed, in full, by the probate court, and for three hundred and fifty dollars upon appeal to the circuit court; that, upon appeal to this court, the judgment was reversed and the case remanded, but that it was manifest, by the opinion delivered, that Rogers was entitled to the allowance of one hundred dollars, and interest from date of the account, and the parties agreed that a judgment for that amount should be rendered, which resulted in a judgment for two hundred and sixty-two dollars, rendered by the circuit court on the 24th of January, 1884. The petition contained averments relied upon to excuse the subsequent delay in applying to sell the land.

G. C. Roth, claiming the land by mesne conveyances from the heirs at law of Mrs. Watkins, appeared in the probate court in resistance of the petition, and filed his answer thereto. The answer contained the following, among other allegations: That Mrs. Watkins died in January, 1858, intestate; that the lands passed to the possession of her heirs, and had been ever since in the exclusive possession of the heirs and those claiming under them; that, before the death of Mrs. Watkins, Rogers brought suit upon the account against her and her husband, and recovered a judgment thereon in the circuit court; that they took an appeal to the supreme court, pending which she died; that he permitted the cause against her to

abate, and prosecuted it against Watkins only, and upon a trial in the supreme court the judgment was reversed, and the cause remanded to the circuit court; that he prosecuted the action against Watkins to a final determination in the circuit court, and it was therein adjudged, in November, 1869, that he recover nothing of Watkins; that thereupon, on the 26th of January, 1870, he presented his claim to the administrator of Mrs. Watkins, who refused to allow it, and has since prosecuted it as is alleged in the petition.

The averments of the answer show a connected chain of title from the heirs of Mrs. Watkins to Roth, and that he and those under whom he claims had been in the continuous possession of the land after her death for more than twenty-five years before the application was made. He pleaded the seven years statute of limitations, and the laches of the administrator, in bar of the petition.

The administrator demurred to the answer, the demurrer was sustained, and the prayer of the petition granted; upon appeal to the circuit court, the same action was taken, and Roth has appealed to this court.

In the view that we have taken of the case, it has not seemed necessary to consider or pass upon the sufficiency of the matter relied upon to excuse the delay in proceeding against the land after the judgment of allowance; but we have assumed that the excuse was sufficient, and considered the case just as though the application to sell had been made immediately after the allowance. The question, then, is whether the right to sell the land is barred by the continuous non-action of the creditor, and possession of the heir from the death of Mrs. Watkins in January, 1858, to the presentment of the claim to the administrator in January, 1870.

The effect of the delay of the administrator after his appointment has been considered by this court in former cases; and in some of them the delay shown was held sufficient, and in others insufficient, to defeat the power. Upon their authority it may be taken as settled that the right to sell will be lost by the "gross laches" or "unreasonable delay" of the administrator in applying for leave: *Mays v. Rogers*, 37 Ark. 155; *Brown v. Hanauer*, 48 Ark. 277; *Stewart v. Smiley*, 46 Ark. 373; *Graves v. Pinchback*, 47 Ark. 471.

But we have no case in which the administrator applied for leave in apt time after his appointment, and the contention was that the power was lost by delay in taking out letters.

The question is, whether such delay has the same effect to defeat the power of sale as the delay of the administrator to apply for leave to sell.

The reason upon which the limitation is placed in the latter class of cases is, that the heirs have a right to the indisputable possession of their inheritance as early as a just regard for creditors will permit, which precludes any unreasonable delay on part of the creditors in the assertion of their rights: 2 Woerner's Am. Law of Administration, sec. 465.

But delay on part of creditors alike postpones the unconditional enjoyment of the heir and deters him from improving or selling his inheritance, whether it relates to the procuring of letters or of an order of sale; and if it is sufficient to bar the power to sell in one case, for exactly the same reason it should be in the other. Delay in taking out letters, and delay in applying to sell after they are taken out, alike keep alive uncertainty in the tenure of the heir, and are alike due to the non-action of the creditor. For, although letters are issued upon application of the administrator, it is within the power of creditors to compel administration after thirty days from the debtor's death; and if it is delayed, it is as much due to them as is the delay in applying for leave to sell. Our conclusion therefore is, that the right to sell is lost by delay in administering, whenever a like delay after administering, in proceedings to sell, would forfeit it: *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 491; *Ricard v. Williams*, 7 Wheat. 116.

This leads us to consider whether the right to sell was lost by delay extending from January, 1858, when Mrs. Watkins died, until January, 1870, when the first steps looking to a sale were taken. Although the decisions of this court establish the rule that the right to sell is lost by "gross laches" or "unreasonable delay," they do not announce any uniform rule for determining what constitutes such unreasonable delay or gross laches. In the case of *Mays v. Rogers*, 37 Ark. 155; it was held that unexplained delay for ten years was unreasonable, and in later cases similar rulings have been made where the delay was longer. What considerations influenced the ruling that ten years was too long to delay, or by what analogies the question of limitation could be decided, is not indicated. If ten years is too long, why is not seven? and what affords the reason for a distinction? Courts in considering what delay would, and what would not, bar the right,

have usually applied the limitation prescribed by some statute in which it discovered analogies that were deemed sufficient to make it applicable. Thus, in some cases, the statute limiting the time for presenting claims against the estates of decedents has been thought to furnish a rule; while in others the statute limiting the lien of judgments has been looked to; and in others that limiting the right of entry upon land. But it is not held that any statute can be taken to furnish a rule of limitation inflexibly controlling in all cases, and the statement is often found that what delay is reasonable must be determined by the court in its sound discretion in each case. Such is the language of this court in the case of *Mays v. Rogers*, 37 Ark. 155.

The rule, stated thus broadly, is in a state of uncertainty which must needs perplex creditors and involve titles. To relieve it entirely of uncertainty, we think could not be done or attempted with propriety; but we think a statement may be made, as applicable when there are no special circumstances to explain and palliate the delay, which does not leave it absolutely subject to the peculiar views of the judge who happens to try each case. It is expressly provided by statute that no person, except certain persons laboring under disability, shall maintain any suit in law or equity for lands, but within seven years next after his right accrued. Mansfield's Digest, sec. 4471; and where the occupant holds under a tax sale or a judicial sale, a shorter time is prescribed by statute for the assertion of adverse claims. Neither of these statutes, nor any other statute, embraces within its purview the administrator's authority to sell lands; but taken together they show that in contemplation of law seven years is deemed a sufficient time for the assertion of title to land, and that it is the policy of the law that title cannot be asserted, or the right of the occupant assailed, after a delay beyond that time. So where the occupant is a trespasser, without any other right than that by possession, and the claimant has a perfect title in law and equity, the delay of the latter to assert this title for more than seven years is deemed so unreasonable and so hostile to the public good, that the statute interposes a bar; and certainly where the occupant is rightfully in possession, and entitled to acquire an indisputable right after creditors have enjoyed a reasonable opportunity to enforce their demands, a similar delay of the latter could not be held more reasonable or more promotive of the public good. It would

certainly disclose a queer and unfortunate inconsistency in the law, if any delay which legislation has stamped as unreasonable in the one class of cases should be adjudged by the courts to be reasonable in the other class. The courts should not so adjudge the question of reasonableness as to produce such inconsistency.

Whether there is a shorter statute of limitation applicable to some other right, whose analogies would make it operative in this case we have not determined; but we think it the manifest policy of our laws, as declared by the statutes above cited, that a delay for more than seven years is not reasonable, and therefore defeats the right of a creditor, or an administrator in his behalf, unless there is something to excuse the delay: *Ricard v. Williams*, 7 Wheat. 119.

In this case it was nearly twelve years from the time when the creditor might have compelled administration until he took the first step toward charging the estate. This included the time covered by the war, when delay is held to have been excusable; but if it be excluded, there is left a term of more than seven years during which the creditor might have compelled administration, presented his claim for allowance and applied for a sale of the land. If he had been the absolute owner of the land, and it had been occupied for that time by one without right, his delay would have barred his right of recovery; because it is deemed so unreasonable and so against public policy that a statute was enacted to effect a bar. If it be so unreasonable in the contemplation of law, as to lead to the enactment of a statute justifying the divestiture of a perfect title, it must be held so unreasonable as to bar an inferior right, which the law requires to be asserted in a reasonable time. As the right to proceed against the estate of Mrs. Watkins was always available, the fact that the creditor was seeking to make his money from her husband is no excuse for the delay.

We think the answer set up facts sufficient to defeat the application, and that the demurrer to it should have been overruled.

Reverse and remand.

LACHES IN PROCURING ADMINISTRATION OF DECEDENT'S ESTATE.—The kindred subject of laches in applying for orders to sell real property of decedent to pay debts is discussed in the monographic note to *Killough v. Hinton*, 26 Am. St. Rep. 22-29. Laches as a bar to relief are treated generally in the note to *Neppach v. Jones*, 23 Am. St. Rep. 143-151. An estate is

open until it is settled; stale claims are as good as others, unless barred by the statute: *Brittain v. Dickson*, 104 N. C. 547. The general rule is that the statute of limitations will not begin to run against a claim until there is some one in existence who can sue and some one who can be sued; but this general rule is qualified by the further rule that parties cannot defer the running of the statute by their own laches: *Gay's Appeal*, 61 Conn. 445. Adverse possession for the statutory time bars relief in equity: *Floyd v. Johnson*, 2 Litt. 109; 13 Am. Dec. 255; the general rule being that courts of equity, by analogy, will follow the limitation provided by law: *Castner v. Walrod*, 85 Ill. 171; 25 Am. Rep. 369. As to stale demands, see extended note to *Bell v. Hudson*, 2 Am. St. Rep. 795-808.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

DAVES v. SOUTHERN PACIFIC COMPANY.

[98 CALIFORNIA, 12.]

MASTER AND SERVANT—FELLOW-SERVANTS—GRADES OF.—The Civil Code of California recognizes no distinction growing out of the grades of employment of the respective employees, and gives no effect to the circumstance that the fellow-servant through whose negligence an injury came was the superior of the plaintiff in the general service in which they were in common engaged. Therefore if a section hand is injured through the negligence of a section foreman by whom the former was employed, and who had power to employ and discharge men employed to work under him, such foreman is answerable, but the master is not. In their relations to their master the section hand and the section foreman are fellow-servants, and neither can recover of him for the negligence of the other except when the master has been guilty of want of ordinary care in the selection of the culpable employee.

MASTER AND SERVANT—VICE-PRINCIPAL.—An employer is not liable for an injury received by his employee through the negligence of a fellow-servant, unless the act which caused the injury was one which it was the duty of the employer himself to perform towards his employees. In such a case the offending servant, in the performance of that duty, is regarded as the agent or representative of his employer, and the latter is therefore responsible for his acts.

RAILROAD COMPANIES—DUTY TO PROVIDE SAFE APPLIANCES AND SELECT COMPETENT SERVANTS.—The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of employees as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employee in his contract of employment.

A RAILROAD COMPANY IS BOUND TO FURNISH SUITABLE SWITCHES and competent servants to operate them, but the actual operation of the switches is a duty belonging to the employees of the company, and for the negligent performance of that duty by one servant, to the injury of another employed in the same general business, the company cannot be held liable. Such negligence is not a violation of the master's duty to provide his servants with a safe place of work.

John D. Bicknell, Bicknell and Trask, and McLachlan and York, for the appellants.

P. C. Tonner, J. W. Sawanwick, and A. W. Hutton, for the respondents.

FITZGERALD, J. This action is brought by the widow and minor daughter of James Daves, deceased, to recover damages for loss suffered by his death through the alleged negligence of the defendants.

The case was tried by a jury, and a general verdict rendered against the defendants, the Southern Pacific Company and Bresnahan, for nine thousand dollars. It was also specially found by the jury that the defendant, Bresnahan, did not close the switch after he opened it to let the hand-car upon the side-track.

This appeal is taken by both defendants from the judgment and the order denying their motion for a new trial.

It appears that the corporate defendant owes and operates a line of railroad between the cities of Los Angeles and Colton, in this state; that the defendant, Bresnahan, was its section foreman, and, as such, had charge of a portion of its track, with power to employ and discharge the men employed to work under him; that James Daves, the deceased, was a section hand employed by Bresnahan to work under him, and was engaged in the performance of his duty as such at the time of the accident which caused his death; that on the morning of the accident, and shortly before it occurred, Bresnahan, with eight of the section men, one of whom was Daves, placed a hand-car on the main track for the purpose of going to a point on the section to make repairs. The hand-car was then run by them some three hundred feet to a switch, which was unlocked and thrown open by Bresnahan, and the hand-car passed onto the sidetrack to clear the main track for the west-bound passenger train, then nearly due and in sight; that immediately thereafter, Daves was engaged in doing something about the hand-car, and was under the west end of it when the train came up, and, the switch being open, the

train ran onto the sidetrack, colliding with the hand-car and killing Daves.

Whether the switch was closed after it was opened by Bresnahan was a controverted point at the trial and was submitted specially to the jury. The jury found that he did not close the switch, and, as there is evidence to support the verdict, it follows that the accident was caused by the negligence of Bresnahan, and the verdict against him cannot be disturbed.

As to whether the verdict will be permitted to stand as to the defendant corporation depends upon whether Bresnahan and Daves were fellow-servants within the meaning of section 1970 of the Civil Code, which reads as follows: "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." This section was construed by this court in *Collier v. Steinhart*, 51 Cal. 116, and in *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255. In the latter case it appears that the defendant was engaged in blasting rock on its mine. Plaintiff was in its employ as a workman, and one Kegan was its "foreman of all work," with authority to employ and discharge the men working under him. Plaintiff was injured while at work by being struck with a rock thrown from a blast, through Kegan's negligence in failing to notify him that the blast was to be fired. The court, in the application of this section to these facts, say: "The injury to the plaintiff was caused by the negligence of Kegan, the foreman of defendant, who was a fellow-servant with the plaintiff, 'another person employed by the same employer in the same general business,' that is, the business of working the mine of the defendant, Kegan being in the blasting, and the plaintiff in the hydraulic, department of the 'general business.' The section of the Civil Code already cited declares that to such a case the rule of *respondeat superior* shall not apply, unless there has been want of ordinary care upon the part of the defendant in the selection of the culpable employee. But the fact was, as found by the court below, that there had been no such want of ordinary care on the part of the defendant; Kegan, the 'foreman,' being found to be 'skillful, competent,' and a proper person to perform the duties with which he was charged. 'The law of this state respecting this sub-

ject,' as set forth in the code referred to, recognizes no distinction growing out of the grades of employment of the respective employees; nor does it give any effect to the circumstance that the fellow-servant, through whose negligence the injury came, was the superior of the plaintiff in the general service in which they were, in common, engaged, and the alleged distinction in this respect insisted upon by the appellant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands: *Collier v. Steinhart*, 51 Cal. 116."

In *Congrave v. Southern Pac. R. R. Co.*, 88 Cal. 360, it was said by Justice McFarland, that section 1970 "not only restates the rule first established by judicial decision as to injury received through the negligence of a fellow-servant, but it clears away to a great extent the difficulties which may have existed as to the meaning of 'fellow-servants.' It declares them to be those employed 'in the same general business.'" And in citing with approval *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255, he uses the following language: "It is clear that in deciding this case the court determined that the code swept away the distinctions which appear in some of the 'adjudged cases' on the subject of fellow-servants: *Collier v. Steinhart*, 51 Cal. 116, referred to in the opinion, is still stronger to the point decided. Both of these cases were approved in *McDonald v. Hazletine*, 53 Cal. 35, which was also a case where an employee was injured through the carelessness of a foreman. These cases were again followed and approved in *Stephens v. Doe*, 73 Cal. 26, where it was held that 'the foreman of a mine, and a miner employed to work under his directions, are fellow-servants; and the owner of the mine is not liable for injuries caused to the latter through the negligence of the foreman, unless he failed to use ordinary care in the selection of the foreman.' The same doctrine was announced in *Brown v. Central Pac. R. R. Co.*, 72 Cal. 523; and *Fagundes v. Central Pac. R. R. Co.*, 79 Cal. 97."

In the *Fagundes* case, just cited, plaintiff's intestate was a laborer employed by the defendant to work on its track. The offending servants were, respectively, the conductor of a train and a track-walker, whose duty it was "to see that the track was clear of obstructions and to signal when they existed." The deceased lost his life through the track-walker's negligent interference with a switch, and the conductor's negligence "in not being sufficiently on the alert to prevent" such

interference. In that case the court held that as "there is nothing in the evidence tending to show any negligence on the part of the defendant in the selection of the employees whose carelessness caused the casualty," it could not be held responsible.

The principle declared in the section of the code referred to, and upon which the decisions in the foregoing cases rested, was settled by the highest judicial authority in this country long before the adoption of the code; but the remarkable contrariety of judicial decisions upon the subject in other states has arisen out of the great difficulty met with in the application of it to the facts of the particular case to be decided. But in the consideration and application of this principle to the case before us, we do not propose to enter into a discussion of the relation which the section foreman of a railroad corporation sustains toward his employer with respect to the duties pertaining to his employment, except in so far as the subject of such relation is necessary to be considered in connection with the character of the particular act itself by which the accident was caused, for the purpose of determining whether such act was a personal duty which the defendant corporation owed to the deceased as its employee, or whether the loss caused by the act complained of was "in consequence of the negligence of another person employed by the same employer in the same general business." This must be determined, not from the grade or rank of the section foreman, but from the character of the act performed by him. If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant in the performance of such duty acted as the representative or agent of his employer, for which the employer is responsible; if it was not, then they were fellow-servants, and the offending servant is alone responsible.

The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of employees as will reasonably protect them against the dangers incident to their employment. The performance

of these duties cannot be shifted by it to a servant so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employee by his contract of employment.

Was then the act or omission which caused the injury a personal duty which the defendant corporation owed to the deceased while he was engaged in the performance of his duties as its employee? If it was, and the deceased was not at fault, then the corporate defendant is liable, otherwise not.

It appears that Bresnahan, through whose negligence it is clear that Daves was killed, was the section foreman of the defendant corporation, and as such had charge of about eight miles of its track, including that portion of it where the accident occurred. It was his duty to keep the track and switches in repair and order, and free from obstructions, so as to practically insure the safety of trains passing over it. He had undisputed control of the section men employed to work under him, and was vested with authority to employ and discharge them. As to whether he was the representative of the employer, with respect to the performance of these duties, we are not called upon, in view of the facts, to decide, for the reason that the act which caused the injury, out of which this action arises, is clearly not embraced within them.

It is not claimed that the corporation did not exercise ordinary care in the selection of Bresnahan as foreman, or that the switch, which he negligently left open, and by which the loss was suffered, was unsuitable or defective. But it is insisted that the corporate defendant violated a duty which it owed to Daves by not providing him with a reasonably safe place to perform his work; that the place was not safe because "a train was coming when the switch was open," in consequence of which he lost his life.

The place, as we have seen, where the accident occurred, was the sidetrack on which the hand-car had been run from the main track to avoid the passenger train, then almost due, and in sight. The place was, of itself, in the first instance, a reasonably safe one, and was resorted to, under the circumstances, for that very reason. The track and switches on Bresnahan's section, in so far as anything appears to the contrary, were in good condition, and so was the hand-car, with the exception of some disarrangement in the brake, which, however, had nothing to do with the injury. The servants

were sufficient in number and competent for the purposes of the employment. It is plain, therefore, that the death of Daves was not caused by the violation of any duty which the master owed to him, but by the negligent act of Bresnahan, who, with respect to the performance of that particular act, was the fellow-servant of Daves. If a brakeman or trainman, who it appears were intrusted with keys to the switch, or one of the section men, had been guilty of the negligent act complained of, we do not think that it would be seriously contended here that such act was the act of the master; and such would undoubtedly be the case if a switchman had been regularly employed to attend that switch, and he negligently performed the act referred to instead of Bresnahan; for a switchman, in using and operating a switch, is no more the agent of the master than is an engineer who is engaged in running a locomotive. It is the duty of the master to provide a suitable switch and competent servants for its operation; when he has done this his duty is at an end and his liability ceases. The keeping of it in position and its use and operation is a duty belonging to the servant, the negligent performance of which, to the injury of another servant employed in the same general business, is a risk which the injured servant assumed when he took the employment, and for which the master is not liable. It is not denied that Bresnahan was a competent and experienced foreman, so that there was no neglect of duty by the master with respect to his selection. But the negligent act complained of was performed by him in the course of the work upon which they were all engaged, and by one who, so far as the particular act was concerned, was clearly not the agent of the master, but the fellow-servant of Daves. The place was, therefore, made dangerous by the culpable negligence of a fellow-servant, and this, notwithstanding the fact that his grade or rank at the time happened to be superior to that of Daves. It therefore follows that the consequences flowing from a place made unsafe under such circumstances are not chargeable to the master. The duty violated did not relate to the place of work, but to the negligent use of an appliance or instrumentality which was proper and suitable for the purpose for which it was furnished by the master, and such use of it was simply a detail of the work or management of the business, therefore a duty of the servant, which he, and not the master, was bound to perform.

From these views it is clear that the negligence of Bresnahan in leaving the switch open in the manner and with the unfortunate result indicated was, notwithstanding his superior rank, the negligence of a fellow-servant within the meaning of section 1970 of the Civil Code, therefore a risk impliedly assumed by Daves when he took the employment, for which the corporate defendant cannot be held responsible.

As this disposes of the controlling question in the case, the others discussed in relation to the instructions are not necessary to be considered.

Let the judgment and order be affirmed as to the defendant Bresnahan, and reversed as to the corporate defendant, and the cause remanded for a new trial.

DE HAVEN, MCFARLAND, HARRISON, GAROUTTE, PATERSON, JJ., and BEATTY, C. J., concurred.

Rehearing denied.

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE: See generally notes to *Abend v. Terre Haute etc. R. R. Co.*, 53 Am. Rep. 621; *Lawler v. Androscoggin R. R. Co.*, 16 Am. Rep. 495-502; *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455; *Richmond etc. Ry. Co. v. Normont*, 10 Am. St. Rep. 835; *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 32, 33; *McMaster v. Illinois Cent. R. R. Co.*, 7 Am. St. Rep. 657. That mere superiority of rank is not conclusive evidence that a fellow-servant is a vice-principal, see *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *McMaster v. Illinois etc. R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180; *Colorado etc. Ry. Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335; *Dwyer v. American Express Co.*, 82 Wis. 307; 34 Am. St. Rep. 44; *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621; *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181. A section foreman having power to control, employ, and discharge the men under him is a vice-principal, and the railway company is liable for his negligence in throwing back an open switch, whereby one of the men under his control is injured: *Sweeny v. Gulf etc. Ry. Co.*, 84 Tex. 433; 31 Am. St. Rep. 71: Compare *Richmond etc. R. R. Co. v. Hammond*, 93 Ala. 181; *Russ v. Wabash Western Ry. Co.*, 112 Mo. 45. Contra: *Shepard v. Boston & M. R. R. Co.*, 158 Mass. 174. If the injury is caused by a breach of a duty which the master owes to his servants, he is liable whatever may be the relative rank of the two servants: *Daniel v. Chesapeake etc. Ry. Co.*, 36 W. Va. 397; 32 Am. St. Rep. 870; *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350; 32 Am. St. Rep. 673. The duty of keeping the frogs in the yards of a railroad company blocked is one of those duties which cannot be delegated by the company to any of its employees, so as to relieve it of the obligation which it is under to keep its yards reasonably safe: *Ashman v. Flint etc. Ry. Co.*, 90 Mich. 567; the general rule being that the duty of providing for the safety of employees rests on the employer, and cannot be delegated: *Louisville etc. Ry. Co. v. Hanning*, 131 Ind. 528; 31 Am. St. Rep. 443.

BIGGI v. BIGGL

[38 CALIFORNIA, 35.]

HUSBAND AND WIFE, EFFECT OF CONVEYANCE TO—AGREEMENT FOR SALE OF COMMUNITY PROPERTY.—By a conveyance of land to husband and wife in the name of both the spouses, each of them becomes the holder of the legal title to one-half the land; and if, pending an action between them for divorce, they enter into an agreement by which, among other matters, it is provided that such land shall be sold for a price which, with certain limitations as to a minimum, is to be such as, in the judgment of a designated referee, represents its fair value, this agreement cannot be construed as conveying to the husband all the wife's interest in the land, leaving her merely the right to enforce the payment by him of one-half the proceeds, but must be regarded both as a recognition by him that the land is community property, and as a mutual executory agreement by both parties that they will consent to the sale of the land on the terms specified, and that, after such sale, each will accept one-half of the proceeds. Such executory agreement is broken if the husband refuses to convey the land to a purchaser who offers a price deemed by the referee to be adequate, and such a breach will give the wife a right either to treat the agreement as rescinded, and bring suit for partition of the land, or to treat it as existing, and seek its enforcement against the husband.

George W. Reed and George M. Shaw, for the appellant.

Hall and Earl, and Dodge and Fry, for the respondents.

HARRISON, J. The plaintiff was at one time the wife of the defendant, Narcisso, and in October, 1888, pending an action between them for divorce, they entered into an agreement for the division of their property, in which it was provided that a lot of land situated on San Pablo avenue, in Oakland, should be sold, and the proceeds of the sale equally divided between them, but that such sale should not be for less than three thousand one hundred dollars, and that, whenever an offer should be made therefor, one Vandercook should be the exclusive judge as to the value of said premises, and as to accepting or rejecting said offer, and that they would abide by his judgment, and sell the premises for such sum as Vandercook might determine. This lot of land had been purchased during the marriage of the parties, and the title thereto taken in the names of them both; but the judgment of divorce which was afterwards rendered between them was silent upon the disposition of the community property. In June, 1889, Vandercook received an offer of three thousand two hundred dollars for the property, which he deemed sufficient therefor, and which the plaintiff agreed to accept; but

the defendant, when requested thereto, refused to accept the offer, or sign a contract of sale, unless he should receive the entire proceeds thereof. The plaintiff thereupon brought this action, alleging in her complaint that the land was owned in common between her and the defendant, Narcisso, setting forth the foregoing agreement and the refusal of the defendant to comply with its terms, and asking for a sale of the land and a division of the proceeds between them. The defendant in his answer denied that the plaintiff had any interest in the land, and also denied that he had refused to accept the offer which the plaintiff alleged had been made for the land. Upon the trial the court found that the defendant was the owner in fee of the entire tract of land, and that the plaintiff had no interest therein, and rendered judgment against the plaintiff, and also a judgment in favor of the defendant, Narcisso, upon his cross-complaint therefor, quieting his title to the land, as against the plaintiff. The court did not make any finding upon the issue of the defendant's refusal to accept the three thousand two hundred dollars offer.

The finding of the court that the defendant was the owner in fee of the entire tract, and that the plaintiff had no interest therein, is contrary to the evidence. The conveyance of the land to the husband and wife made it presumptively community property, and their subsequent divorce, without any disposition of that property in the decree, left them tenants in common thereof: *De Godey v. Godey*, 39 Cal. 157. And the fact that the title had been conveyed to them both caused each of them to be thereafter the holder of the legal title to one-half of the land. The agreement between them prior to the decree of divorce was a recognition by the husband that it was community property, and that the plaintiff was entitled to one-half thereof.

The contention by the respondent that by the aforesaid agreement between the parties the plaintiff conveyed to the defendant whatever interest she had in the land in question, and that her rights against him are only an obligation on his part to pay her one-half of the proceeds of any sale that he may make, is contrary to a proper construction of the instrument. The provision therein that until the property should be sold the husband should be entitled to its possession and occupancy, and should pay to the plaintiff six dollars per month therefor, and the further provision that "the parties hereto agree to abide by the judgment of said Vandercook,

and to sell said premises for such sum, offered or not, as said Vandercook may determine," are inconsistent with the proposition that the plaintiff's title to the land passed to the defendant by the instrument, and show that whenever a sale should be made in accordance with its terms, it was to be made by both parties, and that the consent of the plaintiff, as well as of the defendant, was necessary to effect the sale. The clause relied upon by the respondent, wherein the plaintiff "releases and acquits said party of the first part from all and every claim of every character and kind whatsoever to other property, other than said one-half interest in said life estate, and the one-half of said net proceeds of said sale, as aforesaid," when read in connection with the other portion of the instrument, and the purposes for which the parties recite that they have executed the agreement must be construed as relating to "other" property than that enumerated in the instrument, and not as a release of her interest in the property out of whose sale she was to receive one-half of the proceeds.

For the purpose of ascertaining the intention of the parties, and the interpretation to be given to the instrument, all of its parts must be considered, and when so considered, it is to be construed as a mutual, executory agreement on the part of both parties that they will consent to a sale of the land for such sum, not less than three thousand one hundred dollars, as may be approved by Vandercook, and that upon such sale each will accept one-half of the proceeds thereof. As in the case of any other executory agreement, its breach by one party gave to the other the right to treat it as rescinded, or to seek for its enforcement. It may be conceded that until a breach by either party, the right to a partition of the land between them was superseded or suspended; but the refusal of the defendant to perform the agreement, and his denial of the right of the plaintiff to its performance, gave her the right to disregard the agreement, and either bring an action for the partition of the land, or treat the agreement as existing, and seek its enforcement against the defendant. For this purpose the plaintiff alleged in her complaint the facts constituting the breach by the defendant, and the court should have made a finding upon this issue, as the evidence in the record is ample to sustain her allegations. Upon such finding, inasmuch as her allegation in the complaint that the land could not be partitioned without great prejudice to the owners thereof was not denied, her right to a judgment for

its sale and the division of the proceeds between them would have been established.

The judgment and order denying a new trial are reversed.

GAROUTTE, J., and PATERSON, J., concurred.

HUSBAND AND WIFE, EFFECT OF CONVEYANCE TO.—Property conveyed to the spouses, whether the conveyance is taken in the name of the husband or of the wife, or in the joint names of both, is presumed to be community property: See cases cited at page 636 of the extended note to *Coots v. Bremond*, 86 Am. Dec. 626; *Dimmick v. Dimmick*, 95 Cal. 323; *Mitchell v. Mitchell*, 80 Tex. 101; *Dean v. Parker*, 88 Cal. 283; *Gogreve v. Dehon*, 41 La. Ann. 244. Land held by spouses as tenants by entirety vests in them after divorce as tenants in common: *Stels v. Shreck*, 128 N. Y. 263; 26 Am. St. Rep. 475.

MARSHALL v. TAYLOR.

[98 CALIFORNIA, 55.]

SEDUCTION, PROOF THAT DEFENDANT WAS GUILTY OF RAPE WILL NOT DEFEAT ACTION FOR.—An action by a female to recover damages for her seduction cannot be defeated by showing that she was unconscious at the time the sexual intercourse took place, and that the defendant was therefore guilty of rape.

SEDUCTION, DEFINITION OF.—The word “seduction,” when applied to the conduct of a man towards a female, means the use of some influence, promise, art, or means on his part by which he induces the woman to surrender her chastity and her virtue to his embraces. There must be something more than a mere reluctance on the part of the woman to commit the act. It must also appear that her consent was obtained by flattery, false promises, artifice, urgent importunity, based on professions of attachment or the like for the woman, and that, relying solely on such flattery, false promises, artifice, and importunity, she surrendered her person and her chastity to her alleged seducer.

SEDUCTION BY MARRIED MAN.—THE VIOLATION OF A PROMISE OF MARRIAGE is not one of the necessary constituents of seduction. The injury may be complete even though the female knows that her seducer is a married man.

SEDUCTION.—EVIDENCE IS SUFFICIENT TO SUPPORT A VERDICT FOR THE PLAINTIFF when it is shown that she was a chaste girl, making her living far distant from her few friends, stopping at night alone in a cottage; that she was visited after dark by her employer, a man of wealth and mature years, with whom she was on friendly terms; that after a conversation upon ordinary topics, lasting some time, he gave her a glass of wine, by the drinking of which her mind was seriously affected; that he expressed affection for her, repeatedly caressed her, made promises of future friendship and assistance; and that, after all these things had been going on some length of time, he debauched her. Such facts do not disclose a cold, deliberate transfer of virtue for a consideration, nor a sacrifice of virtue under the promptings of lustful passion.

NEW TRIAL will sometimes be granted on account of the misconduct of counsel in attempting to get before the jury matters not within the issues by means of improper questions and offers of proof.

SEDUCTION—DAMAGES HELD NOT EXCESSIVE.—A verdict for twenty-five thousand dollars, in an action by a chaste, unmarried female for her seduction, is not so excessive as to be a ground for a new trial, when it appears that the plaintiff is a young and inexperienced girl, and the defendant a man of mature years and large means.

C. C. Stephens, for the appellant.

W. W. Holcomb and W. W. Williams, for the respondent.

GAROUTTE, J. This was an action for damages, plaintiff alleging by her complaint that the defendant with force and violence made an indecent assault upon her, and then and there wickedly seduced, debauched, and carnally knew her, when and whereby she became pregnant with child. A trial resulted in a verdict for plaintiff in the sum of twenty-five thousand dollars, and this appeal is prosecuted from the judgment and order denying a motion for a new trial. It is developed by the evidence that the defendant is a man of mature years, of large property interests, and at the time the alleged cause of action arose was residing with his wife and daughters at a seaside resort in San Diego county, and, among his various business callings, was there engaged in keeping a hotel. The plaintiff was an employee of the defendant, engaged as a waitress at the hotel. She was of the age of sixteen years and ten months, had seen considerable of the world, having resided with her mother in various localities, and, as indicated by her evidence and correspondence introduced at the trial, may be considered a bright and intelligent girl for her years.

The proof of the seduction rests alone upon the testimony of the plaintiff, and her evidence is squarely and entirely contradicted in every essential particular by the testimony of the defendant, he denying ever having had any sexual intercourse with her at any time or under any circumstances. Indeed, at every step of the trial perjury was there in all its hideousness; but all those matters came before the jury, and, as evidenced by their verdict, her statements were believed.

It is now insisted that, conceding the facts to be as detailed by the plaintiff, no case of seduction has been made out by her evidence. Her testimony upon cross-examination as to the circumstances of the act is stronger in her behalf than her testimony in chief, and may be summarized as follows: That

in the early part of October, 1888, on a Saturday evening, either the sixth or thirteenth thereof, about eight o'clock, while she was in her room at her cottage alone, a short distance from the hotel, Taylor visited her, having called upon her once before, and brought her some books. He conversed with her for a while, and then asked her if she ever drank any wine. He then handed her a glass of wine, which she drank. He poured out some for himself and tasted it, but said it was too sweet, he did not like it. She continues: "In about five minutes from the time I took the wine I began feeling sick. At first I began to feel sick at my stomach, my head began to go around. I had sensations of tingling all over my body. I never felt that way before. I had difficulty in talking. My voice was husky. That lasted a moment or two. I got up and said, 'I am quite sick, Mr. Taylor.' I got up, but could not stand; my limbs felt so heavy and numb I could not step. As I stood up Mr. Taylor stood up, and I rested my hand on the front of the table. As he got up he stepped towards me. I was glad to have support, as I could scarcely stand. I did n't repulse him, because I could n't stand up. There was in my ears a sound like the rushing of waters. My voice sounded to me very distinct and clear. His voice sounded the same. He put his arms around me and assisted me to the bed. When he put his arms around me he bent and kissed me, and assisted me to the bed, and said that he loved me, and 'you poor little girl, I am sorry you are sick.' He said that just before or just after he kissed me, I don't remember which. He half carried me to the bed. It was a very short distance. I did n't lay down at once. I sat on the edge of the bed. He sat beside me, with one arm still around me. I can scarcely recollect anything that happened distinctly. I asked him to get me a drink of water. As he got up I fell backwards on the bed, could n't sit up. He got me a drink of water. He had his arm around my waist, and kissed me again. I asked him to go away, and he said he did not want to leave me if I was going to be ill. He kissed me again and told me that he loved me. He told me that he loved me, and put his hand in my dress, and asked me if I loved him. And then he asked me if I would care if he stayed with me. I made no reply. I could scarcely speak. I don't remember distinctly what occurred after that. I don't know what happened at all until I knew he hurt me. I had not gone to bed. I know it was wine Mr. Taylor gave me because

I had seen it served to the guests at the hotel." At another stage of the proceedings, in referring to this event, she testified as follows: "Mr. Taylor assured me of his friendship, and promised me that he would also be a friend to me; that he had plenty of means, and I would never want, and he gave me his word that he would never see me in any trouble, and I then yielded. He said these things to me while I was lying in bed. I had a child, which was born on August 22, 1889; the defendant was the father of that child. Until I met Mr. Taylor I was a chaste and virtuous girl."

In actions of the character under present investigation, where the plaintiff is a young girl, poor and friendless, and the defendant a man of mature years, married and wealthy, it may well be said that the contest is an unequal one; for her youth and poverty are often weapons of victory, and form a citadel of strength in the minds of jurors which is impregnable to successful attack by the opposition. Thus in her weakness lies her strength, while a defendant's wealth, his family, and his gray hairs are elements which, when placed before the jury, often tend only to his own destruction. These things are made plain by a perusal of the history of legal jurisprudence upon the subject, and this unequal struggle between the parties has frequently caused verdicts to be rendered opposed both to the law and the evidence. And the extreme danger which arises in this class of cases that a man may be despoiled of his good name and his property, demands of courts a careful consideration of the evidence which forms the basis of such verdicts. For these reasons, and from the additional facts that the case as disclosed by the record is a most peculiar one, and that the verdict rendered largely exceeds in amount any verdict returned by a jury in an action of seduction in any of the courts of this country to which our attention has been directed, we have given the record a most careful examination.

As before intimated, the evidence is squarely conflicting; the plaintiff says the defendant seduced her; the defendant says he never had sexual intercourse with her at any time. The plaintiff says she was a chaste and virtuous girl; the defendant's witnesses say in effect she stood but little above the plane of the common strumpet. But the jury were fairly and fully instructed by the court as to the law of the case, including the rules of law applicable to the weight of evidence, and the credibility of witnesses; and upon this conflicting

evidence, taken in connection with the law, they found for the plaintiff, and, under an established practice, we have not the right to disturb those findings of fact.

Does the plaintiff's evidence establish a case of seduction? and that brings us to the inquiry, what is the meaning of the word "seduction," as used in the Civil Code, for it is there provided, section 374: "An unmarried female may prosecute as plaintiff in an action for her own seduction and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor." Her evidence may be viewed from two distinct standpoints. Viewed from one standpoint it indicates that she had lost consciousness from the effect of the wine, at the time the act was committed. If this be so, the defendant was guilty of rape, and while it is held in those states where seduction is a criminal offense that proof of a rape will defeat a prosecution for seduction (*State v. Kingsley*, 39 Iowa, 439; *State v. Lewis*, 48 Iowa, 578; 30 Am. Rep. 407; *Croghan v. State*, 22 Wis. 444); yet no case is found in the books where a party has failed to recover in damages for seduction when the evidence at the trial disclosed the defendant guilty of the more heinous offense of rape. Such a showing but aggravates the injury, and furnishes ample ground for exemplary damages. Perhaps it was from this standpoint of vision that the jurors viewed this case, and for that reason assessed the damages at such a large amount. It does not lie in the mouth of the defendant to say: "I am not liable to pay any damages in this action, because the evidence discloses I did not seduce the plaintiff, but committed the atrocious crime of rape." The complaint in this case is broad in its allegations, and, except as to the use of force, the elements forming the measure of damages in a case either of seduction or rape are very similar.

Where a parent sues for the seduction of his daughter, and consequent loss of service, and it appears that the intercourse was accomplished by force, such a showing will not defeat the action, but will aggravate the injury: *Furman v. Applegate*, 23 N. J. L. 28; *Kennedy v. Shea*, 110 Mass. 147; 14 Am. Rep. 584; *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100. While the recovery of the parent is based upon a different principle from that involved where the female is the complainant, yet we see no bad effect to follow an application of the same rule in her case. Certainly a court will not be astute in drawing fine distinctions from the evidence in order to discover a case

of rape, if such fact would defeat a recovery. For the foregoing reasons we conclude that, if plaintiff was unconscious from the effects of the wine at the time defendant had intercourse with her, her cause of action was not defeated by reason of such fact.

Assuming her to have been conscious at the time the act of intercourse took place, and consenting thereto, was she seduced? "Seduction" is not defined by our statute; and seduction, as recognized at the common law, based purely upon the loss of service to the master, is such, that we are bound to hold our statute, in using the word, intended other things. We think the word is there used in its popular acceptance, as recognized in this country. The court in its instructions to the jury declared the law upon this question as follows: "The word 'seduction,' when applied to the conduct of a man toward a female, means the use of some influence, promise, art, or means on his part, by which he induces the woman to surrender her chastity and her virtue to his embraces. There must be something more than mere reluctance on the part of the woman to commit the act, and her consent must be obtained by flattery, false promises, artifice, urgent importunity, based on professions of attachment, or the like, for the woman, and that relying solely on said promises or professions of flattery or artifice or importunity, she surrendered her person and chastity to her alleged seducer. And that relying and being influenced solely by such promises, flattery, artifice, and urgent importunity, she then being chaste, surrendered her person and chastity to her alleged seducer." After a careful examination of many cases, we are satisfied the law is fairly declared in the foregoing instruction, and that such instruction is in line with the authorities in this country: *State v. Bierce*, 27 Conn. 319; *Croghan v. State*, 22 Wis. 444; *Brown v. Kingsley*, 38 Iowa, 220. Modern lexicographers define seduction as the act of persuading a woman to surrender her chastity. In its ordinary acceptance it implies a betrayal of confidence, and for that reason a great majority of this class of cases are based upon a violated promise of marriage, but this is not a universal rule by any means; for a married man may seduce a girl, and that, too, though she is aware of his marriage. There are many cases to this effect, but they have arisen generally where the injured parties being young girls and easily beguiled could not be held to the plane of

responsibility occupied by women possessing a wider knowledge of the world.

In the present case we have a chaste girl, not seventeen years of age, making her living far distant from her few friends, stopping at night alone in a cottage. She is visited after dark by her employer, with whom she was upon friendly terms, a man of wealth and years. After a conversation upon ordinary topics, lasting some time, he gives her a glass of wine, which she drinks, and her mind is seriously affected thereby. He expresses affection for her, repeatedly caresses her, makes promises of future friendship and assistance, and after all these things have been going on for some length of time he seduces her; at least a recital of these events would picture a case of seduction to the ordinary mind. They do not disclose a cold, deliberate transfer of virtue for a consideration. Neither do they describe a sacrifice of virtue to the demands of lustful passion; but the blandishments, the expressions of friendship, the promises, the wine, weapons of the seducer, were all there. If the plaintiff were a woman of years, with that knowledge of the world which age brings with it at the present day, the case might present a different aspect. The struggle would not have been so unequal, and she would have been held to a stricter responsibility. But we cannot charge her with that judgment and discretion which come only with age and experience. The drinking of the wine seriously affected her, and its administration alone may be well termed an artifice that conduced to her downfall. If these things which she has said be true, and the jury has so found the facts, her cause of action is supported by the evidence.

We have examined in detail the alleged errors of law relied upon by the appellant in the admission and rejection of evidence by the court, and either find them not well taken, or the error, if committed, not prejudicial to appellant.

It is insisted that respondent's counsel was guilty of such misconduct during the progress of the trial as to have prejudiced defendant's case thereby in the minds of the jurors. This misconduct is claimed to have consisted in attempting to get before the jury matters not within the issues by means of asking improper questions and "offers to prove," etc. It was held in the case of *People v. Ah Len*, 92 Cal. 282, 27 Am. St. Rep. 103, that this character of misconduct could be carried to such lengths as to justify a new trial, and for that

reason a new trial was there ordered. The rule is a most wholesome one, and in a criminal case especially its rigid enforcement will be maintained by the court. A trial court should always be alert to prevent an attorney from obtaining advantages in jury trials by the practice of methods not countenanced by the ethics of the profession. The record here presented does not disclose sufficient in this regard to justify a new trial of the case; neither do we think the showing made for a new trial based upon affidavits sufficient.

We are not prepared to say that the damages are excessive. Courts are not disposed to make smooth the ways of the seducer. At common law in these cases, verdicts of juries were seldom held to be excessive, and this, too, where the parent recovered damages upon the fiction of loss of service. With much greater reason should we not disturb the amount of a verdict where the party directly injured is the party plaintiff. The law is most liberal in these matters, and rightly so. Through the seducer's arts a young girl has been outlawed from society; she has been cast upon the world robbed of her innocence; an injury has been done which nothing can repair; a loss has been suffered which nothing can alleviate.

For the foregoing reasons let the judgment and order be affirmed.

PATERSON, J., DE HAVEN, J., and McFARLAND concurred.

Justices HARRISON and FITZGERALD not having heard the argument do not participate in the decision thereof.

SEDUCTION: See generally note to *Weaver v. Bachert*, 44 Am. Dec. 162-179. It is no defense to an action for seduction, that the intercourse was accomplished through force. See cases cited at p. 164 of that note. For definitions of seduction see pp. 162, 163 of the same note, and also *Patterson v. Hayden*, 17 Or. 238; 11 Am. St. Rep. 822.

SEDUCTION BY MARRIED MAN.—An indictment for seduction under promise of marriage cannot be sustained, where the evidence shows that the promise was made by a married man, and that the prosecutrix knew that he was married: See note to *Weaver v. Bachert*, 44 Am. Dec. 164.

SEDUCTION—ARTIFICE, WHAT IS: See *Hawm v. Banghart*, 76 Iowa, 683; 14 Am. St. Rep. 261. A man who persuades an unmarried woman of previously chaste character to have sexual intercourse with him on the representation that there is nothing wrong in the act, and that no one will find it out, is guilty of the crime of seduction by artifice: *State v. Hemm*, 82 Iowa, 609.

DAMAGES FOR SEDUCTION are allowed to be assessed on a very liberal scale, and it is only under very extraordinary circumstances that the appellate court will interfere with a verdict on the ground that it is excessive: *Steven-*

son v. Belknap, 6 Iowa, 97; 71 Am. Dec. 392. Evidence as to the pecuniary circumstances of the defendant is admissible for the purpose of assessing the proper amount of damages: *White v. Gregory*, 126 Ind. 95; *De Haven v. Helvie*, 126 Ind. 82; *Shewalter v. Bergman*, 123 Ind. 155. See also note to *Bennett v. Beam*, 36 Am. Rep. 445.

EX PARTE WHITWELL.

[98 CALIFORNIA, 78.]

POLICE POWER—REGULATION OF BUSINESS BY LEGISLATIVE BODIES.—In the exercise of the police power the legislature has a very wide discretion as to what is needful or proper, but is not the exclusive judge as to what is a reasonable and just restraint upon the right of the citizen to pursue a business which is recognized as innocent and useful to the community. As that right is one which is protected by the constitution, it is always a judicial question whether any particular regulation of the right is a valid exercise of the police power.

POLICE POWER, RIGHT OF COURTS TO DECLARE WHAT IS VALID EXERCISE OF.—The power of the courts to declare invalid what they may deem an unreasonable legislative regulation of a business which the citizen has a constitutional right to follow must be exercised with the utmost caution, and only when it is clear that the ordinance or law so declared void passes entirely beyond the limits of the police power, and infringes upon rights secured by the fundamental law.

POLICE POWER—THE BUSINESS OF CONDUCTING A PRIVATE ASYLUM, in which proper care can be given to insane persons who are not dangerous to themselves or others by a member of the medical profession having experience and special skill in the treatment of such cases is a necessary and humane one; and the right to maintain such an asylum, and to practice this particular branch of the medical profession, cannot be prohibited nor burdened with unreasonable and oppressive conditions which virtually amount to its prohibition.

POLICE POWER—ORDINANCE REQUIRING ASYLUMS FOR INSANE PERSONS TO BE FIREPROOF, WHEN VOID.—The board of supervisors of a county, in the absence of any general legislation on the subject, may, by ordinance, prescribe proper regulations for the protection of patients in a private asylum for insane persons from the danger which might result to them from the destruction of the asylum building by fire; but a requirement that such an asylum shall be maintained only in a building constructed of either brick and iron, or stone and iron, without any reference to the size of the building, or the number of the patients it is designed to accommodate therein, and without regard to other safeguards against fire with which it may be provided, is unreasonable. Legislation of this character, which imposes an onerous expense upon a lawful business, can only be justified by the fact that the danger which it ostensibly seeks to avert is one which experience has demonstrated to be a probable result of conducting the business, notwithstanding the exercise of ordinary care to prevent it.

POLICE POWER—ORDINANCE DENYING PROPERTY OWNER THE RIGHT TO CONDUCT A BUSINESS THEREON, WHEN VOID.—An owner of property cannot be prohibited by a legislative body from conducting thereon a lawful

business, unless such business is of such a noxious or offensive character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality. An asylum for the treatment of mild forms of insanity is not a business of that character, and therefore a provision in an ordinance of a board of county supervisors declaring that no asylum in which persons suffering from any degree of insanity are treated shall be permitted within four hundred yards of any dwelling or school is not a valid police regulation.

POLICE POWER—ORDINANCES IMPOSING UPON THE PROPRIETOR OF A PRIVATE ASYLUM EXPENSES WHICH ARE NOT NECESSARY for the protection of the public are invalid. Hence such proprietor cannot be required to surround by a brick or stone wall, of not less than twelve feet high and eighteen inches thick, an asylum in which only patients suffering from the milder forms of insanity are to be treated.

POLICE POWER—ORDINANCE REQUIRING SEPARATION OF PATIENTS IN PRIVATE ASYLUM, WHEN VOID.—The proprietor of a private asylum for the treatment of certain specified forms of mild insanity cannot be compelled to provide separate buildings for the different classes of patients, nor to segregate male from female patients.

George C. Ross, for the petitioner.

G. W. Towle, Jr., and Robert Y. Hayne, for the respondents.

DE HAVEN, J. This is a proceeding upon *habeas corpus*, and it appears from the return to the writ issued herein that at the date of its service the petitioner was imprisoned by the sheriff of San Mateo county upon a charge of maintaining within that county a hospital for the treatment, for reward, of insane persons, without having procured a license so to do, as required by an ordinance adopted by its board of supervisors March 16, 1892. The ordinance referred to purports to be one "to license for purposes of regulation and revenue the business of keeping . . . within the county of San Mateo . . . hospitals, asylums, homes, retreats, or places for the care or treatment for reward of insane persons, or persons of unsound mind, or inebriates, or persons affected by or suffering from any mental or nervous disease, or who are suffering from the effects of the excessive use of alcoholic liquors."

By the first section of this ordinance it is made unlawful to maintain within the county of San Mateo any hospital, asylum, or place for the care or treatment for reward of any insane person, or person belonging to either of the classes mentioned in the title of the ordinance, unless the keeper of such hospital or asylum shall have first procured a license therefor. The second section provides that before any such license shall issue, the person desiring the same shall make

a written application therefor to the board of supervisors. The third section provides for giving notice of the time for the hearing of such application, when any person interested in favor of or in opposition to the granting of such license may be heard, and the sworn testimony of persons may be taken in relation to such application; and if after such hearing the board shall be satisfied "that the designated premises are suitable for the purpose, and that the persons designated in such application as superintendent and attending physician or physicians are proper and suitable persons for their several stations," said board shall grant such applicant a license, "provided, however, that in no case shall such license be granted unless the board shall be satisfied that the building and buildings designated in such application is and are what are usually known as fireproof, by reason of being constructed of brick and iron, or stone and iron, and that such building so designated in said application is not more than two stories in height, and that the same and the land used in connection therewith, or such part of said land as any of the patients are to have access to, is surrounded by a brick or stone wall not less than eighteen inches in thickness, and not less than twelve feet in height, and in which wall there is but one opening, which opening is closed by a solid iron door so constructed and fitted into said wall as that the same may be securely fastened by a combination lock, and said door is furnished with a combination lock; and provided further, that no such license shall be granted if the premises designated in the application are within a distance of four hundred yards from any dwelling-house or schoolhouse." Section 4 provides: "That no license issued hereunder shall authorize male and female persons, or more than one of the classes of persons designated in section 1 hereof, to be cared for or treated in the same building, or put together in the same building, or in any inclosure connected with any building." Section 9 gives the form of the license which is to be issued, and which by its terms only authorizes the person to whom it is issued to carry on the business of keeping a hospital or asylum for the care or treatment of one of the classes of persons designated in the first section of the ordinance, subject to all the conditions, restrictions, and penalties in the ordinance contained.

The petitioner alleges that he is a physician and surgeon; and that the particular branch of the profession to which he

especially devotes his attention is the treatment of insane persons, and patients with nervous and mental disorders, and inebriates, and persons suffering from the excessive use of intoxicating liquors; and that for the purpose of more effectually treating such persons, he, long before the passage of said ordinance, at great expense, purchased and now owns twenty-two acres of land in the county of San Mateo, on which he has erected buildings which he uses as a home or asylum for them; but such buildings are not fireproof, or of the character designated and required by the ordinance, and are also situated within four hundred yards of the dwellings of other persons. The petitioner further alleges that he treats in the asylum established by him both male and female persons suffering from any and all nervous diseases, and from mild forms of insanity, such as melancholia, dementia, and hysteria, but that he does not knowingly admit or treat violent or dangerous cases.

It is claimed by the petitioner that the provisions of the ordinance above set out impose unreasonable restrictions upon his right to prosecute a lawful business and to devote his property to a lawful use, and that such provisions are therefore in conflict with the constitution of the United States and of this state, and are for this reason void.

Upon the other hand the respondent contends that the ordinance is a police regulation, designed among other things to protect the patients in such asylums from the danger which might result to them from fire, and also to promote the comfort and peace of the community in which such an asylum may be located, by requiring insane patients to be confined within walls, and so prevented from coming in contact with people who are entitled to be free from such annoyance; and it is further said that the nature of the business conducted in such an asylum or hospital is such as to justify a regulation that it shall only be carried on in a building removed from the dwellings of others; and in this connection it is argued that the ordinance does not in either of its requirements conflict with any general law, and that the court is not authorized to declare it invalid because in its judgment the ordinance may be deemed unreasonable.

The police power—the power to make laws to secure the comfort, convenience, peace, and health of the community—is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for that purpose is necessarily

committed to the legislative body in which the power to make such laws is vested: *Ex parte Tuttle*, 91 Cal. 589.

But it is not true that when this power is exerted for the purpose of regulating a business or occupation, which in itself is recognized as innocent and useful to the community, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As the right of the citizen to engage in such a business or follow such a profession is protected by the constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power: *Tiedeman's Limitation of Police Power*, secs. 85, 194; *State v. Jersey City*, 47 N. J. L. 286; *Commonwealth v. Robertson*, 5 Cush. 488; *Austin v. Murray*, 16 Pick. 121. This principle is stated very forcibly in the case of *Mugler v. Kansas*, 123 U. S. 681, in the following language: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

And so also in the *Matter of Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636, Earl, J., in delivering the opinion of the court in that case, said, in relation to the power of the legislature to make police regulations: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks its voice must be heeded. It furnishes the supreme law and guide for the conduct of legislators, judges, and private persons, and, so far as it imposes restraints, the police power must be exercised in subordination thereto."

And this necessary limitation upon the power of the legislature to interfere with the fundamental rights of the citizen in the enactment of police regulations was recognized by this court in *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, in which case we said that the personal liberty of the citizen

and his rights of property cannot be invaded under the disguise of a police regulation.

This power of the courts, however, to declare invalid what they may deem an unreasonable legislative regulation of a business or occupation which the citizen has the constitutional right to follow, although undoubted, must, from the nature of the power, be exercised with the utmost caution, and only when it is clear that the ordinance or law so declared void passes entirely beyond the limits which bound the police power, and infringes upon rights secured by the fundamental law.

The true rule upon this subject is thus expressed by the supreme court of the state of Missouri, in the case of *St. Louis v. Weber*, 44 Mo. 547. "In assuming, however, the right to judge of the reasonableness of an exercise of corporate power, courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will always be exercised with the highest discretion, and when it is plainly granted, a clear case should be made to authorize an interference upon the ground of unreasonableness."

With this general statement of the power and duty of the court, we proceed to consider whether the ordinance before us is a valid regulation of the right to maintain such an asylum or hospital as the petitioner alleges he is now conducting in the county of San Mateo.

The state, may, of course, make proper laws for the care, government, and safe-keeping of the unfortunate insane within its limits. This duty it owes, not only to those who are thus rendered incapable of taking care of themselves, but also to the community at large, the members of which are entitled to protection from the acts of persons not subject to the commands of reason: *Matter of Colah*, 3 Daly, 529; *Brown on Insanity*, sec. 6.

In the discharge of this duty the state has provided public asylums, to which persons who are so far disordered in mind as to be dangerous to remain at large may, upon satisfactory proof of such condition of mind, be committed by the judge of a superior court, but it has made no provision at all for those of unsound mind who are not regarded as dangerous to themselves or to the property or persons of others; and even as to those who are insane to such a degree that they may under the law be committed to the state asylum, the statute

provides that "the kindred or friends of an inmate of the asylum may receive such inmate therefrom on their giving satisfactory evidence to the judge of the court issuing the commitment, that they, or any of them, are capable and suited to take care of and give proper care to such insane person, and give protection against any of his acts as an insane person": Section 19 of "An act to provide for the future management of the Napa State Asylum for the Insane," approved March 6, 1876: Stats. of 1875, 1876, 133.

It will thus be seen that it was not the intention of the legislature, in providing public asylums for the insane, to deprive the kindred and friends of even dangerous lunatics of the privilege of caring for them elsewhere, upon showing their ability and willingness to do so; while as to those not regarded as dangerous to themselves or others, the law does not contemplate that they shall be confined in such asylums at all. But unfortunate persons belonging to this latter class are not to be denied the right to receive the patient attention and often healing treatment of a comfortable private asylum or hospital, if they or their kindred or friends are able and willing to incur the expense of such care and treatment. The business, therefore, of conducting a private asylum, in which proper care can be given to such persons by a member or members of the medical profession having experience and special skill in the treatment of such cases, is a necessary and humane one; and the right to maintain such an asylum or hospital, and to follow and practice this particular branch of the medical profession, cannot be prohibited or burdened with unreasonable and oppressive conditions.

In our opinion the ordinance now under consideration imposes arbitrary and wholly unnecessary conditions upon the right to maintain such an asylum as that which petitioner alleges he is now conducting. While it is doubtless true that the board of supervisors of a county have the power, in the absence of any general legislation upon the subject, to prescribe, by ordinance, proper regulations for the protection of the patients in such an asylum from the danger which might result to them from the destruction of the asylum building by fire, still the requirement that such hospital or asylum shall be maintained only in a building constructed of either brick and iron, or iron and stone, without any reference to the size of such building or the number of patients it is designed to accommodate therein, and without regard to other

safeguards against fire with which it may be provided, is clearly unreasonable. It may be conceded that there would be less danger from fire in a building of the character required by the ordinance than in one differently constructed, but experience has not shown that the danger from fire in such a hospital is such an imminent peril, when reasonable care is taken to guard against it, as to justify a requirement that such hospital shall be conducted only in a building made from the materials named in the ordinance. In the management of a hospital where insane persons are treated it is necessary, and it must be presumed, that there will be a sufficient number of competent attendants to prevent danger or damage from any unreasonable actions of such insane persons. Without such attendants no such asylum or hospital could be properly conducted. The fact, however, that a person is suffering from an insane delusion requiring treatment does not necessarily make him dangerous to himself or others, or render inactive in him the ordinary instincts which prompt self-preservation. On the contrary, as was said by Mr. Justice Cooley in his opinion in the case of *Van Deusen v. Newcomer*, 40 Mich. 129: "Many insane persons, even after they have become hopelessly so, are to all appearance perfectly harmless, and for years continue to discharge the common duties of life in the most regular and acceptable manner, being trusted by every one in those particulars to which the insane delusion does not extend. The law takes notice of the fact that in many cases the disease leaves the person in the responsible possession and control of most of his faculties, and that the same motives influence his action in the employment of them that influence those not afflicted."

It is the duty of the superintendent or attending physician of such an asylum to ascertain the nature of the delusion affecting any person received for treatment; and if there should be one admitted afflicted with pyromania, or whose actions would for any reason be difficult to control, it cannot be assumed that such person would not be properly guarded, or that the hospital would not be managed with that degree of prudence which would render the patients therein reasonably safe from danger on account of fire. Legislation of this character, which imposes an onerous burden of expense upon a lawful and highly meritorious business, cannot be justified by the mere possibility of the danger which it ostensibly seeks to avert. It must rest upon the fact that experience has dem-

onstrated that such danger, in the absence of such legislative regulation, is one which may reasonably be anticipated as the probable result of conducting such business, notwithstanding the exercise of ordinary care to prevent it.

The provision that no asylum in which persons suffering from any degree of insanity are treated shall be permitted within four hundred yards of any dwelling or school cannot, in our judgment, be sustained as a lawful police regulation. A law or ordinance, the effect of which is to deny to the owner of property the right to conduct thereon a lawful business, is invalid, unless the business to which it relates is of such a noxious or offensive character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality; and an asylum for the treatment of mild forms of insanity is not properly classed as such. If rightly conducted, such asylum would not render the occupation of dwellings or schools in its neighborhood uncomfortable to such a degree that its maintenance would be deemed a nuisance, or any impairment of the substantial rights of occupants of such dwellings or schools. It is not like a private asylum for the confinement of dangerous lunatics, or a hospital for the treatment of loathsome or contagious diseases; and the reasons which make it necessary and proper to exclude from the thickly settled portions of cities and towns slaughter-houses, soap factories, and tanneries, with their offensive smells; magazines for the storage of powder, and powder-mills, with their attendant dangers, or any business or occupation which seriously interferes with the health or comfort of others if permitted in such localities, do not apply to a hospital whose inmates are harmless, although insane. It is possible that the maintenance of such an asylum would be to some people in its vicinity disagreeable and annoying, in the sense that it would be more or less repulsive to them; but this is not enough to justify a regulation like that under consideration. There are many unpleasant and even annoying things which must be borne by persons living in a state of organized society, in order that others may also enjoy their equal rights under the law.

The ordinance further denies to any one the right to conduct such an asylum, unless the building or buildings used for that purpose, and the grounds to which the insane persons may be allowed access, shall be surrounded by a brick or stone wall, at least twelve feet high and eighteen inches

thick. The erection of such a wall would be costly, rendering the buildings and surrounding grounds uninviting, and unsightly to the eye, and would be a manifest injury to the unfortunate persons placed therein for care and treatment. This requirement of the ordinance cannot be defended upon the ground that it is reasonably necessary for the protection of the public. Whatever justification there might be for such a provision if applied only to a private asylum in which dangerous lunatics are to be confined, it is plainly unreasonable when applied to a hospital of the character maintained by the petitioner, where only persons suffering with mild forms of insanity, and who are harmless, are received. Such persons, if properly attended, do not require prison walls to restrain them, and it would be barbarous and inhuman to subject them to such treatment. The board of supervisors of a county, or the legislative department of any city or town in which such an asylum is erected, may, undoubtedly, provide by ordinance that patients therein shall not be permitted to leave the grounds upon which it is erected, unless accompanied by an attendant, and may impose a proper penalty upon the superintendent or keeper of such asylum for a failure to conform to such regulation. Such an ordinance would be reasonable, and at the same time afford all necessary protection to the public without conflicting with the rights of any one.

The ordinance further provides that only one of the classes of persons therein mentioned shall be treated in the same building, and that a separate license shall be required for the treatment of each of the diseases named, and that male and female patients shall not be "cared for or treated in the same building." These provisions are clearly invalid. The treatment of inebriates, and insane persons, and of mental and nervous diseases not amounting to insanity, is a special branch of practice in the medical profession, and no reason exists why a physician desiring to maintain an asylum, or hospital, for the treatment of such cases should be required to erect separate buildings for the treatment of persons suffering from each of such diseases. Such a requirement is an unnecessary interference with the business of maintaining such an asylum, without any corresponding benefit to the public. If it be said that the welfare of the patients may demand this separation; that persons suffering from nervous prostration, for instance, should not be treated in the same building with

the insane, the answer is that this is a matter which may be safely left to the judgment of the physician whose business it is to treat such cases, and whose education and experience, it must be presumed, qualify him to superintend such an asylum. The power to pass upon such a question has not been committed to boards of supervisors of the different counties, and such a regulation of the manner of conducting the business of maintaining such a private asylum is, therefore, unauthorized and void. In relation to that part of the ordinance requiring the separation of the sexes, it is sufficient to say that the admission of male and female patients to a private asylum, or hospital, conducted in one building, is not immoral, *per se*, nor can it be made so by any legislative declaration.

It is unnecessary to further discuss the provisions of this ordinance, or to pass upon other objections which have been urged against it. Viewed separately, we think each provision discussed in this opinion invalid, and when the ordinance is considered as a whole, the invalidity of each provision becomes more plainly apparent. The ordinance covers completely and entirely the business of maintaining such an asylum as petitioner alleges he is now conducting, and imposes upon it such burdensome, oppressive, and unreasonable conditions as in effect to amount to its prohibition.

The case has been argued here both orally and in the briefs of counsel with great learning and ability, and we have given to the questions involved the careful consideration which their importance demands, and our conclusion is: 1. That it is competent for the court to determine whether any particular regulation of a useful business or occupation is a reasonable restriction upon the constitutional right of the citizen to engage in such business, or follow such occupation. 2. That the business of maintaining a private asylum for the treatment of mild forms of insanity, and of persons afflicted with other diseases named in the ordinance before us, is a lawful one which cannot be prohibited either directly or indirectly. 3. That the ordinance which petitioner is accused of violating is in each and all of the provisions referred to in this opinion unreasonable, and therefore void. It follows that the petitioner is entitled to be discharged.

Petitioner discharged.

McFARLAND, J., PATERSON, J., GAROUTTE, J., HARRISON, J., and FITZGERALD, J., concurred.

POLICE POWER, EXERCISE OF, WHETHER VALID, ALWAYS A JUDICIAL QUESTION: *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460; *Jacksonville v. Ledwith*, 26 Fla. 163; 23 Am. St. Rep. 558; *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465.

POLICE POWER.—REQUISITES OF VALID ORDINANCES: See generally *Anderson v. Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175; *In re France*, 63 Mich. 396; 6 Am. St. Rep. 310. Power to regulate, restrain, and even suppress particular kinds of business may be delegated by the legislature to a municipal corporation: *Town Council of Summerville v. Pressley*, 33 S. O. 56; 26 Am. St. Rep. 658; but ordinances regulating callings must preserve equality of right: *Simrall v. City of Covington*, 90 Ky. 444; 29 Am. St. Rep. 398; See also notes to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 638-640. For instances of unreasonable and invalid ordinances, see note to *Ward v. Mayor etc. of Greenville*, 35 Am. Rep. 702, 703.

GRAY v. McWILLIAMS.

[98 CALIFORNIA, 157.]

EASEMENTS—DISCHARGE OF SURFACE WATERS.—The owner of the higher of two adjoining tenements has an easement to have all waters falling or accumulating on his land discharged over the lower tenement, to the same extent as they would be discharged in a state of nature; and this natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment of the dominant proprietor.

WATERS AND WATERCOURSES—RIGHT OF LANDOWNER TO PROTECT HIMSELF AGAINST OVERFLOW FROM RIVER.—If the owner of higher land upon a river subject to overflow fails to erect levees or embankments to protect his land from the effect of floods, his neighbor owning land in his rear may protect himself from such floods by erecting a levee upon his own land, although the effect thereof may be to increase the flood waters on the higher land of the neighbor who has not resorted to like means of protection.

SURFACE WATERS, WHAT ARE.—WATERS COMPOSED PARTLY OF SEEPAGE WATER ESCAPING THROUGH A LEVEE BY PERCOLATION and partly of rainfall are subject to the rules in regard to surface waters.

WATERS, SEEPAGE, RIGHT TO RESTRAIN FLOW OF.—If waters seep through a levee and come to the surface much as springs do, and gradually seek a lower level, not in a defined channel, but as surface water is wont to do, by percolation and force of gravity, they should be allowed to pass off by the methods devised by nature, and an embankment or levee erected by the owner of lower land to hold such water back and to cause it to be retained or to flow upon the higher land may, at the instance of the owner of the latter, be abated as a nuisance.

U. W. Brown, for the appellant.

H. M. Albery and K. Albery, for the respondent.

SEARLS, C. Action to remove and abate as a nuisance an embankment or levee, erected by defendant upon his own land,

but which held back and caused water to flow upon the land of plaintiff, and to recover damages for injury caused thereby. Plaintiff had judgment, from which and from an order denying a motion for a new trial defendant appeals.

The plaintiff, Mary Gray, has been since 1888 the owner in fee in her own right and in possession of a tract of land consisting of over forty acres situate in the county of Colusa.

The defendant, A. S. McWilliams, is and since September, 1887, has been the owner of and in possession of a tract of land of over two hundred acres, lying south of and adjoining plaintiff's land for a distance of eighty rods.

Upon the dividing line, between the land of plaintiff and defendant, is a roadway or avenue fifty feet wide, known as "Fruitvale avenue." Upon the center of this avenue is an embankment, constructed in 1884 by the grantors of plaintiff and defendant, for the double purpose of a roadway and as a check to hold water for irrigation purposes. This embankment, which runs east and west, if maintained intact throughout its length prevents the water accumulating on the north side from flowing in a southerly or southwesterly direction to and upon the land of defendant, and, as a consequence, causes or tends to cause the same to accumulate upon the land of plaintiff. In the winter of 1889 and 1890 defendant closed up a waterway through this embankment, in consequence of which plaintiff's land was flooded, her orchard thereon injured, etc. The land north and east of that of plaintiff is slightly higher than plaintiff's land, there being a slight slope over the lands of plaintiff and defendant toward the southwest. These lands are all on the west side of the Sacramento river, and east of them and on the west side of said river is a large levee to protect the country from overflow in times of flood. West of this large levee, and east of the lands of the plaintiff and defendant, is a raised wagon-road leading from Colusa to Princeton, the general course of which is northwest and southeast. Through the embankment of this road there are several openings or waterways.

The court finds that commencing at the Princeton road there is a trough, watercourse, or washout, running thence in a southwesterly direction across the lands of plaintiff and defendant, crossing "Fruitvale avenue" in its course. This "trough, watercourse, or washout" across plaintiff's land, and for one hundred feet on the land of defendant, has abrupt banks, is about three feet deep, and from twelve to fourteen

feet wide. From a point on defendant's land, say one hundred feet from his north line, this trough subsides into a depression or swale, which extends for a couple of miles in a southwesterly direction to Hoppins slough, which in turn connects with a large natural watercourse, called the "Trough," etc.

The court finds that this trough, watercourse, or washout was formed naturally by the action of the water, has existed certainly since 1881, and serves in time of rainy weather or high water to drain and carry off the surface and surplus water from plaintiff's land and from lands of others naturally draining upon and over hers.

The court finds, as to the sources from which the waters thus accumulating upon plaintiff's land came, as follows:

"9. That the water thus thrown back upon the plaintiff's land was surface water, and was composed partly of seepage water, escaping from the Sacramento river by percolation through the river levee, and partly of rainfall; but what portion of said water was seepage or percolating water, and how much thereof was rainwater cannot be found or determined from the evidence; but there was no rush or great flow or volume of water spreading over the surface of the soil as in case of flood or overflow from the river, and at no time did it appear in such quantities but that it would have naturally passed off in the said waterway or trough on plaintiff's and defendant's lands, had there been no obstruction in said waterway or trough."

There is a branch ditch on the west side of the Princeton road, which defendant claims by his answer served to concentrate the surface waters and seepage water coming from the Sacramento river, and pour them upon plaintiff's land at a fixed point, etc., but as the finding of the court is against this view, the facts connected therewith need not be mentioned at length. Like considerations apply to matters of estoppel and prescription.

To say that the evidence is sharply contradictory scarcely conveys an adequate idea of the antagonisms it presents. There is hardly an issue made in the case but that might have been decided differently, and the conclusion would have found support in the evidence.

After the findings in the cause were filed, counsel for defendant asked the court, in addition to its findings, to pass upon eighteen additional propositions, which were offered in writing, which request was refused.

Some of these propositions involved facts and issues already passed upon; others may be regarded as involving evidentiary rather than ultimate facts, and while it would have been of interest here to have had an exposition of a few of them, we cannot say, in the face of the somewhat full and explicit findings, that any error was committed by the court in its refusal.

Among the conclusions of law deduced by the court were:

1. That plaintiff's land is the dominant tenement, and defendant's land the servient tenement; that the water which was obstructed, and caused the injury to plaintiff, was surface water, and that the plaintiff had an easement, and defendant owed plaintiff a servitude for the flowage of such water from plaintiff's land onto and across defendant's land.

2. That the embankment of earth or obstruction complained of was a nuisance, and should be abated as such, etc.

Had plaintiff an easement in the land of defendant for the flow of the water in question over it?

"An easement is a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement, in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former": *Goddard on Easements*, 2; *Stevenson v. Wallace*, 27 Gratt. 87; *Ritger v. Parker*, 8 Cush. 147; 54 Am. Dec. 744.

"A charge or burden upon one estate (the servient) for the benefit of another (the dominant)": *Morrison v. Marquardt*, 24 Iowa, 85; 92 Am. Dec. 444.

Easements are of two kinds, similar to one another in many respects, but differing in many particulars. To the first class belong those easements created by act of man, and to the second those which are given by the law to every owner of land. This latter class is given by law, because without them there would be no security in the enjoyment of land by its owner. Without them a neighbor might deprive a landowner of the benefits derivable from things which in the course of nature have been provided for the common good of all, and which the law wisely provides shall not be wrested from one by the act of another. These easements are said to be inherent in the land *ex jure naturale*, and are often termed "natural rights."

A careful review of the adjudicated cases will, it is believed, show that a good deal of obscurity has been thrown around many questions connected with the subject under considera-

tion by a failure to observe the line of demarcation between these two classes of easements. As it is with the latter class that we have exclusively to do in the present case, we must eliminate from consideration such rules of construction as apply exclusively to easements founded upon grant or prescription.

What then is the "natural right" of the plaintiff in the premises? It is claimed that at common law it was held that no natural easement or servitude existed in favor of the owner of the superior or higher land as to mere surface water, or such as falls or accumulates by rains or the melting of snow; and that the proprietor of the inferior or lower tenement or estate might, at his option, lawfully obstruct or hinder the flow of such water thereon, and in so doing might turn back or off of his own lands and onto and over the lands of other proprietors such water without liability by reason of such obstruction or diversion. It is also claimed that the doctrine of the civil law is almost directly the reverse of that of the common law, and that under it the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one to discharge all waters falling or accumulating on his land which is higher, upon or over the land of the servient owner as in a state of nature; and that such natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant proprietor. And as that conclusion is in unison with the doctrine on the same subject with the courts of fully one-half of the states of our union, all professing to be controlled as we are by the common law, we are justified in saying that with us the rule established has become and is a part of our common law.

In the case of *Ogburn v. Connor*, 46 Cal. 847, 13 Am. Rep. 213, this court, in a well-considered opinion, held in substance that where two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of such upper tract of land has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude.

In *McDaniel v. Cummings*, 83 Cal. 515, the court was urged to overrule *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213,

but refused to do so, placing such refusal upon the ground of *stare decisis*. The case was, however, distinguished from *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213, and passed off upon the principle laid down in *Lamb v. Reclamation District*, 73 Cal. 125; 2 Am. St. Rep. 775.

In view of the reasoning and conclusions in *McDaniel v. Cummings*, 83 Cal. 515, and *Lamb v. Reclamation District*, 73 Cal. 125, 2 Am. St. Rep. 775, it may be fairly assumed, as the consensus of opinion on the part of the court:

1. That the owner of the lower or servient tenement must permit the surface water from the higher land of his neighbor to flow unobstructed over his lower land, as held in *Ogburn v. Connor*, 46 Cal. 347; 13 Am. Rep. 213.

2. That the rule of *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213, does not apply to the overflow of water from the large rivers of the state, and that the owners of land along such streams have a right to construct levees or embankments for the protection of their lands from the ravages of flood waters, although the effect thereof may be to prevent the free discharge of such flood waters in as large and ample a manner as they would otherwise do, or may tend to increase the flow of water upon lands not similarly protected, as was held in *Lamb v. Reclamation District*, 73 Cal. 125; 2 Am. St. Rep. 775.

3. That if the owner of higher land upon a river subject to overflow fails to erect levees or embankments to protect his land from the effect of floods his neighbor owning lower land in his rear may protect himself from such floods by erecting a levee upon his own land, although the effect thereof may be to increase the flood waters on the higher land of the neighbor who has not resorted to like means of protection, as was held in *McDaniel v. Cummings*, 83 Cal. 515.

If there is an essential difference in the conclusions reached in these several cases the reasons for such difference are to be found in the elementary facts forming their basis.

In the case of flood waters escaping from natural streams we view them, it is true, as a common enemy, against which we may protect ourselves without the commission of a wrong; but, after all, this declaration is used in view of the means of defense resorted to rather than in the abstract. We build the banks of the river higher for our protection, it is true, but in so doing we aid nature in her effort to carry the water to its ultimate destination, and he who to protect himself from a

flood should erect a barrier across the channel of one of our important rivers would probably be met with the declaration that it was not the proper mode of warfare, even against a "common enemy."

In the case of surface waters having no defined channels of escape, and the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature shall be left untrammelled in their disposition.

Was the water held back by defendant's embankment surface water, in the sense that defendant was legally inhibited from retarding its passage over his land?

Surface water is usually defined to be such as falls from the clouds in the form of rain or snow, or rises to the surface in springs. The reason why the owner of the higher land has an easement in the lower land for their escape is to be found, not so much in the source from which they are derived, as in the fact that nature has adopted this method of ridding the land of their presence in surplus quantity.

I can see no good reason why the water which accumulated upon the land of plaintiff should not be subject to the rules in regard to surface water, as defined in *Ogburn v. Connor*, 46 Cal. 347, 13 Am. Rep. 213.

A portion of such water (how much the court cannot determine) came from the seepage through the levee built to protect, or which at least does protect, all these lands from overflow. The evidence showed that this river levee was a large and high one; that the winter of 1889-1890 was one of heavy floods; that for some months the water was several feet above the general level of the country, and that gradually the levee became saturated until the water seeped or percolated through and under it; that it came to the surface much as springs do, and gradually sought a lower level, not in a defined channel but as surface water is wont to do, by percolation and by the force of gravity. It came without any act or agency of the plaintiff, and as she was, so far as appears, powerless to direct its course, it would seem rational to say that like other surface water coming without volition, it should be permitted to pass off by the method devised by nature.

It must be within the observation of many of us that these large levees in time of protracted flood, however well constructed, are not so impervious to water under pressure but that percolation or seepage to some extent is liable to occur.

Constructed as they are in this state, under the encouragement of law, for the general benefit, and effecting as they usually do great good to individuals and communities, it would seem natural that the minor inconveniences inevitable and inseparable from their existence should be borne by those upon whom they naturally fall, and that to concentrate the whole effect upon a single individual is not in consonance with our views of justice under such circumstances. Had the defendant left the waterway through Fruitvale avenue open, as he was in duty bound to do, to allow the escape of what, beyond all cavil, was the surface water upon the land of plaintiff, this seepage water, according to the finding of the court, would have passed off without injury to plaintiff, and, so far as appears, without detriment to any one. If the presence of this seepage water enhanced the servitude imposed upon defendant's land, it was without the action of plaintiff, and was and is a condition not dependent upon the acts of the parties, the result of which all the landowners subject to its effect must bear in their turn.

The only theory suggesting itself under which a different conclusion could be reached is to be found in the doctrine of *McDaniel v. Cummings*, 83 Cal. 515, holding that upon the failure of the landowner next the river to construct a levee, the owner of lower land in the rear of him can do so, even though the higher land near the river is surcharged with flood water as a consequence.

If this may be done, it may be asked in case a levee is built by the landowner next the river, as in this case, which restrains the major portion of the flood water, why may not the owner of lower land in the rear, as in case of this defendant, protect himself from the minor portion or seepage water by a sublevee, even though it increases the quantity of water upon the owner of higher land, as in case of plaintiff here?

The answer must be that the rule enunciated in *McDaniel v. Cummings*, 83 Cal. 515, was in consonance with a sound public policy favoring a cherished object, viz., the reclamation and improvement of valuable lands subject to overflow, and was well calculated to meet and do justice in cases where the owners of higher lands along the rivers refuse or neglect to construct levees or to join with their neighbors in doing so. It does not apply here, because a main levee has been built upon the higher land contiguous to the river, which appears to effect, in the main, the object of its construction.

To permit each owner of lower lands in the rear to construct sublevees to hold back the seepage water escaping from the main levee would be to permit them to flood the protected higher land in front, and thus practically to frustrate the beneficial results of the main levee. Such a rule, when thus extended, would tend to retard rather than promote improvement and consequent prosperity.

As a conclusion, after a careful examination of the case in all its different aspects, it is held that the court below was correct in its conclusions that plaintiff, as the owner of the higher land, had an easement or right to have all the water in question, including what was termed "seepage water," flow from her land to, upon, and over the land of defendant, and to that extent the land of defendant was servient and that of the plaintiff the dominant tenement.

The judgment and order appealed from should be affirmed.

TEMPLE, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HARRISON, J., GAROUTTE, J., PATERSON, J.

Hearing in Bank denied.

WATERS AND WATERCOURSES—SURFACE WATERS, RIGHTS OF LAND-OWNERS REGARDING: See generally note to *Martin v. Jett*, 32 Am. Dec. 123-127. Later cases, to the point that a landowner has a right to have all natural waters discharged in a natural way over an adjacent and lower tenement are given in the notes to *Earl v. De Hart*, 72 Am. Dec. 402; *Beard v. Murphy*, 86 Am. Dec. 697; *Butler v. Peck*, 88 Am. Dec. 457; *Livingston v. McDonald*, 89 Am. Dec. 572; *Hooper v. Wilkinson*, 77 Am. Dec. 196. Compare *Overton v. Sawyer*, 1 Jones, 308; 62 Am. Dec. 171; *Total v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570; *Tootle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732; *Nienger v. Norwood*, 72 Ala. 277; 47 Am. Rep. 412; *Boyd v. Conklin*, 54 Mich. 583; 52 Am. Rep. 831; *McDaniel v. Cummings*, 83 Cal. 515; *Dayton v. Drainage Commrs.*, 128 Ill. 271; *Osten v. Jerome*, 93 Mich. 196. For cases illustrating the opposite doctrine that the owner of the lower tenement may obstruct such waters, see the above notes, and also the following cases in this series: *Gannon v. Hargadon*, 10 Allen, 106; 87 Am. Dec. 625; *Bowlsby v. Speer*, 31 N. J. L. 351; 86 Am. Dec. 216; *Lessard v. Stram*, 62 Wis. 112; 51 Am. Rep. 715; *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Chadeayne v. Robinson*, 55 Conn. 345; 3 Am. St. Rep. 55; *Rowe v. St. Paul etc. Ry. Co.*, 41 Minn. 384; 16 Am. St. Rep. 706; *Johnson v. Chicago etc. R. R. Co.*, 80 Wis. 641; 27 Am. St. Rep. 76. See also note to *Gerrish v. Clough*, 97 Am. Dec. 565-569, as to landowner's right to protect himself against overflow.

BEER v. CLIFTON.

[98 CALIFORNIA, 828.]

NEGOTIABLE INSTRUMENTS.—A NOTE INDORSED AFTER MATURITY is equivalent to one payable on demand, and unless payment thereof is demanded and, in the event of refusal, notice given to the indorser within a reasonable time, the latter cannot be held.

Thomas L. Carothers, for the appellants.

Crittenden Thornton and F. H. Merzbach, for the respondent.

McFARLAND, J. This action was brought to recover three thousand five hundred dollars, with interest, costs, etc., upon a promissory note made by defendants to plaintiff on March 29, 1890, and payable July 1, 1890. The jury returned a verdict for plaintiff for only one thousand two hundred and forty dollars and twenty-four cents, and plaintiff moved for a new trial upon the grounds of insufficiency of the evidence to justify the verdict, that the verdict is against law and errors of law occurring at the trial, etc. The court granted a motion for a new trial, stating in its order that the motion was granted because "the first and third instructions offered by defendants' attorneys, and given, are erroneous, and must have been misleading to the jury." The defendants appeal from the order granting a new trial.

The facts necessary to be stated are these: In March, 1889, the plaintiff was, and for several years before that had been, engaged in the business of keeping a country store at Covelo in Mendocino county. The defendant Weill is her nephew, and for five years prior to the time last stated had been her principal clerk and assistant in said business. On March 18, 1889, she sold said business, together with certain real estate, livestock, and choses in action to the defendants, Weill and Clifton. In payment for the property sold, in addition to certain cash payments and a mortgage for fifteen hundred dollars on the real property sold, they gave her seven promissory notes for five hundred dollars, each payable monthly in succession, the first becoming due on November 1, 1889. These notes not having been paid as they became due, and plaintiff becoming anxious for their payment, a little over a year afterward, to wit, on March 29, 1890, the said notes were taken up by the giving of a note for three thousand five hundred dollars, signed by said defendants, Weill and Clifton,

and also by the defendant, George E. White, which is the note sued on in this present action.

Among the choses in action sold by plaintiff to Weill and Clifton on said March 18, 1889, were eleven promissory notes, which had been given by different parties to plaintiff; and all of said eleven notes were, at the time of said sale, overdue. These notes were at the time of said sale, and being overdue as aforesaid, indorsed by said plaintiff, that is, she wrote her name on the back of said notes. Plaintiff testified that she delivered said notes to Weill and Clifton at the time of the sale without indorsement; and that about two weeks afterwards Weill requested her to write her name on the back, saying that he could not collect the notes unless she did so, and that she would not have indorsed them if she had known that such indorsement would make her liable in any way for or upon said notes, and that she sold them absolutely and without any intention of being personally liable thereon; but Weill and Clifton contended, and introduced evidence to the point, that according to the terms of the sale they were to collect whatever could be collected on said eleven notes, and that whatever they could not collect after the exercise of due diligence was to be credited upon and deducted from the amount due from them to plaintiff upon the said seven promissory notes which they had given her, and consequently to be credited upon the three thousand five hundred dollar note sued on, which was given in lieu of said seven notes as aforesaid. Under these circumstances it was of course material and important for the jury, in view of the conflicting evidence, to know what, in law, was the liability which attached to plaintiff upon said eleven notes from the mere fact of her indorsement of them. And upon this point the said instructions 1 and 3 are as follows:

"1. If you find from the evidence in this case that the plaintiff indorsed the eleven promissory notes by writing her name on the back of each, and that nothing was said by any of the parties when she did so about her liability thereon by reason of indorsing them, then she is liable, and you will so find by your verdict, unless defendants failed to collect the notes, or any of them, through their own negligence."

"3. The indorsement of the eleven promissory notes by the plaintiff is admitted, and by that indorsement she made herself liable for their payment. Indorsing them as she did makes her liable, unless there was at the time a contract

between her and Clifton and Wei'll that she was not to be held liable thereon. The burden of showing such a contract is upon her, and she must prove it to your satisfaction, from all the evidence, before you would be justified in finding that she is not liable."

It is clear, as the court below decided when granting a new trial, that these instructions were erroneous. They are somewhat conflicting, but they announce the doctrine that the indorser of a note after its maturity is absolutely liable thereon, without regard to any right to have a demand made upon the maker and notice to the indorser on nonpayment. This is not the law. The indorser of an overdue note has as much right to demand and notice as the indorser of a note before maturity, the only difference being as to the time when the demand and notice must be made and given. This has always been the law and is stated in all the text-books. In Daniel on Negotiable Instruments, paragraph 611, the rule is stated in these words: "When a negotiable instrument is indorsed after maturity, payment must be demanded of the payor within a reasonable time, and notice, in the event of a refusal, given to the indorser, in order to charge him, it being regarded as equivalent to one payable on demand." This court has had occasion to so announce the law: e. g., *Beebe v. Brooks*, 12 Cal. 310; *Thompson v. Williams*, 14 Cal. 162; *Keyes v. Fenstermaker*, 24 Cal. 329. See also *McKewer v. Kirtland*, 33 Iowa, 351; *Colt v. Barnard*, 18 Pick. 260; 29 Am. Dec. 584; *Swartz v. Redfield*, 13 Kan. 550; *Light v. Kinsbury*, 50 Mo. 331; *Ecfert v. Des Coudres*, 1 Mill, 69; 12 Am. Dec. 609, and note; *Simpson v. Griffin*, 9 Johns. 131; *Leavitt v. Putnam*, 3 N. Y. 494; 53 Am. Dec. 322. At common law the rule is that in case of indorsement after maturity the demand and notice must be within a reasonable time; reasonable time depending upon the facts in each particular case. Section 3135 of our Civil Code provides that the apparent maturity of a promissory note, payable at sight or on demand, is, if it bear interest, one year after its date; or, if it does not bear interest, six months after its date. According to the above quotation from Daniel an instrument indorsed after maturity "is equivalent to one payable on demand"; in Chitty on Bills, 215, it is said that indorsing a promissory note after maturity is "equivalent to the act of drawing a bill at sight"; and in *Goodwin v. Davenport*, 47 Me. 118, 74 Am. Dec. 478, the court say: "It is equivalent to a note on demand dated at the time of

the transfer, so far as demand and notice are concerned." If these authorities be correct then it might be safely said that in case of indorsement of an overdue note, demand and notice should be made and given at least within the time specified in said section 8135 for demand and notice in case of a note payable on demand; and there might be cases where the demand and notice should be within a much shorter time than that mentioned in said section of the code. In the case at bar, however, the question of reasonable time does not arise, for the jury were erroneously instructed that plaintiff was not entitled to any demand and notice whatever. In fact, no notice was given until July 8, 1890, and the notice did not state the date of the demand.

For the reasons above given the order granting a new trial should be affirmed; for we see nothing in appellant's point that said erroneous instructions were not prejudicial to plaintiff.

The order appealed from is affirmed.

FITZGERALD, J., and DE HAVEN, J., concurred.

NEGOTIABLE INSTRUMENTS—INDORSEMENT AFTER MATURITY.—Note negotiated after maturity is to be treated as note on demand, as between indorser and indorsee, so far as demand and notice are concerned: *Goodwin v. Davenport*, 47 Me. 112; 74 Am. Dec. 478; *Hunt v. Wadleigh*, 26 Me. 271; 45 Am. Dec. 108. And the indorser cannot be held unless demand is made of the maker, and notice of non-payment given: *Poole v. Tolleson*, 1 McCord, 199; 10 Am. Dec. 663; *Berry v. Robinson*, 9 Johns. 121; 6 Am. Dec. 267; *Esfert v. Des Landres*, 1 Mill, 69; 12 Am. Dec. 609; *Hill v. Martin*, 12 Mart. (La.), 177; 13 Am. Dec. 372; *Nash v. Harrington*, 2 Aikens, 9; 16 Am. Dec. 672; *Kirkpatrick v. McCullough*, 3 Humph. 171; 39 Am. Dec. 158; *Gray v. Bell*, 2 Rich. L. 67; 44 Am. Dec. 277; *Goodwin v. Davenport*, 47 Me. 112; 74 Am. Dec. 478; *Gravel v. Struemel*, 53 Iowa, 712; 36 Am. Rep. 250. In Vermont the indorsee must prove demand and notice within sixty days of the indorsement to him, in order to charge his indorser: *Verder v. Verder*, 63 Vt. 28.

BULLARD v. McARDLE.

[98 CALIFORNIA, 855.]

EXECUTION SALE IS VOID UNLESS SUPPORTED BY A VALID JUDGMENT.—

Even if there was a judgment in existence at the time the writ of execution was issued, yet, if it has been vacated or satisfied before any sale is made under the execution, the power to make the sale has also been destroyed; and the result is the same, whether the judgment was directly satisfied or vacated, as by payment, or an order of court, or indirectly, as by granting a new trial in the action, or by an appeal whose effect is to prevent its execution.

APPEAL FROM JUSTICE'S COURT, EFFECT OF.—When an appeal is taken from a justice's court to the superior court, and a sufficient undertaking is given to stay execution, the effect is to transfer the entire record to the appellate court, and to cause the action to be retried in that court, as if originally brought therein. In such a case the judgment appealed from is completely annulled, and is not thereafter available for any purpose.

VACATION OF ORDER DISMISSING APPEAL FROM JUSTICE'S COURT, and recall of execution issued, after such dismissal by the justice, leaves the cause undetermined and pending before the appellate court, as it was when the appeal was first perfected. It is not essential to the validity of the vacating order that it should be filed in the justice's court.

EXECUTION SALES—CAVEAT EMPTOR.—One who purchases at a sale based upon a writ of execution issued out of a justice's court is affected with notice that an appeal from the judgment has been taken to the superior court, and of all the subsequent proceedings in that court, such as an order vacating the dismissal of the appeal, and recalling the execution issued out of the justice's court after such dismissal. Ignorance on the part of such purchaser that the dismissal has been thus vacated is no defense to a replevin suit brought by the defendant in the original action for the recovery of property sold by the sheriff subsequently to the recall of the execution by the superior court.

Frank M. Short and D. M. Seaton, for the appellant.

Church and Corey, for the respondents.

HARRISON, J. A money judgment was recovered in the justice's court against the plaintiff herein, on the 19th of July, 1889, from which on the same day he appealed to the superior court upon questions of law and fact, giving a sufficient undertaking for the appeal, and to stay execution upon the judgment. The record on the appeal was filed in the superior court September 5, 1889, but on the 21st of October the plaintiff in the action, evidently not knowing that fact, obtained an order dismissing the appeal, upon the ground that the papers on appeal had not been filed. The appeal when filed had been numbered 2820 on the Register of Actions in the superior court, and the motion to dismiss the appeal, as well as the

order of dismissal, were entitled as of a case No. 2909 on that register. On the next day after this order was made a certified copy thereof was filed in the justice's court, and an execution upon the judgment appealed from was issued and placed in the hands of the officer for service. On the 29th of October the superior court made an order vacating its previous order dismissing the appeal and recalling the execution that had been issued out of the justice's court, but no copy of this order was filed in the justice's court. On the 7th of November the constable, by virtue of the execution, sold certain cattle of the plaintiff to the defendants herein, and immediately after the sale the plaintiff herein demanded the property from the defendants, and upon their refusal brought this action of claim and delivery. The property was delivered to him pending the action, and the court rendered judgment in his favor. The defendants moved for a new trial, which was granted, and the plaintiff has appealed from that order.

One who derails title to property through a sale under an execution must show, not only the execution and the sale, but also a valid judgment in support of the execution: *Blood v. Light*, 38 Cal. 654; 99 Am. Dec. 441; *Quirk v. Falk*, 47 Cal. 453; *Schuyler v. Broughton*, 65 Cal. 252. The sheriff in making the sale acts under a naked statutory power, dependent for its existence upon the existence of the judgment which he is attempting to execute, and if there is no judgment in support of the writ of execution, under which he makes the sale, the power to make the sale is wanting. By obtaining his judgment the plaintiff has become authorized to satisfy the amount therein named out of the defendant's property, and the law designates the sheriff as his agent to effect this result. The sheriff is, however, but the agent of the plaintiff in making the satisfaction, and can exercise no greater power therefor than could the plaintiff himself. Unless there is a valid judgment in existence, neither the plaintiff himself nor the sheriff has any authority to deprive the defendant of his property. Even though there was a judgment in existence at the time the writ of execution was issued, yet, if it has been vacated or satisfied before any sale is made under the execution, the power to make the sale has also been destroyed; and it is immaterial whether the judgment was directly satisfied or vacated, as by payment, or an order of court, or indirectly, as by granting a new trial in the action, or by an appeal whose effect is to prevent its execution. A different rule obtains

when the judgment is vacated or appealed from after a sale of property under its authority. In such a case the *bona fide* purchaser is not affected even by a reversal of the judgment. It is, however, always incumbent upon the purchaser to see at his peril that there is a valid judgment in existence at the time he makes his purchase. Hermann on Executions, sec. 255; *Wood v. Colvin*, 2 Hill, 566; 38 Am. Dec. 598; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553; 26 Am. Rep. 627; *McClure v. Logan*, 59 Mo. 234. "The sheriff, in making sale of property under process of the court, acts under a power, and if the power does not exist, no title passes, even to an innocent purchaser. He who buys under a power buys at his peril, and acquires no title without showing a valid, subsisting power." *Carpenter v. Stilwell*, 11 N. Y. 71. "The judgment was the sole foundation of the sheriff's power to sell and convey the premises, and if the judgment was paid when he undertook to sell and convey, his power was at an end, and all his acts were without authority, and void. The purchaser under a power is chargeable with notice if the power does not exist, and purchases at his peril:" *Craft v. Merrill*, 14 N. Y. 461.

By perfecting the appeal from the justice's court the case was entirely removed from that court, and only the superior court had thereafter jurisdiction in the matter. The judgment in the justice's court was not merely suspended, but by the removal of the record was vacated and set aside. *Thornton v. Mahoney*, 24 Cal. 569; *People v. Treadwell*, 66 Cal. 400. When the effect of an appeal is to transfer the entire record to the appellate court, and to cause the action to be retired in that court as if originally brought therein, as is the case when appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and is not thereafter available for any purpose: *Bank of North America v. Wheeler*, 28 Conn. 441; 73 Am. Dec. 683; *Campbell v. Howard*, 5 Mass. 376; *Levi v. Karrick*, 15 Iowa, 444; *Keyser v. Farr*, 105 U. S. 265.

The order made by the superior court, vacating its previous order of dismissal, took from the execution that had been issued by the justice its entire vigor, and rendered the acts of the officer thereunder nugatory. The judgment upon which it was issued had been vacated by an appeal therefrom, which was sufficient both in form and in substance to divest the justice's court of any further jurisdiction over the case. The case was thereafter in the superior court, and the rights of the

parties were to be determined by the action of that court. Being a court of general jurisdiction, all its orders are attended with the presumption of regularity (*Sherer v. Superior Court*, 94 Cal. 354), and its order vacating its previous order of dismissal, and recalling the execution, left the cause undetermined and pending before it, as it was when the appeal was first perfected. It was not essential to the validity of this order that it should be filed in the justice's court. It was effective as soon as it was made. The defendant had done all that was required of him in taking the appeal, and it was not necessary for him to take any steps to protect himself from further proceedings in the justice's court. It was, however, incumbent upon the purchasers at the sale, under the execution issued out of the justice's court, to see that such execution was supported by a valid judgment, and they were charged with notice of the proceedings in that court, and that the judgment had been appealed from prior to the issuance of the execution. They were also charged with notice that the cause was thereafter pending in the superior court, and they were required to examine the proceedings of that court to find support for the issuance of the execution. They could not rely upon the fact that a copy of the order dismissing the appeal had been filed in the justice's court. They assumed at their risk the regularity of that order, as well as any subsequent proceedings in the superior court, and the ignorance of the subsequent order vacating it is not available to them in their attempt to retain the property of the plaintiff herein, which they purchased in reliance upon the order of dismissal.

Inasmuch as upon the uncontroverted facts in the case the decision could not have been different from that which was given at the trial, the order for a new trial cannot be sustained, and it is therefore reversed.

GAROUTTE, J., and McFARLAND, J., concurred.

EXECUTION SALE UNDER A SATISFIED JUDGMENT is void: *Wood v. Colvin*, 2 Hill. 566; 38 Am. Dec. 598, and note, but where the satisfaction has not been entered on the record it is in some states voidable only: *Boren v. McGhee*, 6 Port. 432; 31 Am. Dec. 695; *Reed v. Austin*, 9 Mo. 722; 45 Am. Dec. 336.

EXECUTION SALES—RULE OF CAVEAT EMPTOR: See extended notes to *McGhee v. Ellis*, 14 Am. Dec. 181, and *Neal v. Gillaspie*, 26 Am. Rep. 38. There is no warranty in execution sales, and if the sheriff sells personal property in good faith he is not responsible to the purchaser for any defects in the title: *Lenark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40, and note; *Greer v. Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613, and note; *Barnett v. Vincent*,

69 Tex. 685; 5 Am. St. Rep. 98, and note; *Bartholomew v. Warner*, 32 Conn. 98; 85 Am. Dec. 251, and note; *Walbridge v. Day*, 31 Ill. 379; 83 Am. Dec. 227, and note.

JUSTICES OF THE PEACE—APPEAL.—An appeal from the judgment of a justice of the peace upon both law and fact brings the case before the appellate court for a trial *de novo* upon its merits: *Welter v. Nokken*, 38 Minn. 376; *Missouri Pac. Ry. Co. v. Lea*, 47 Kan. 268. Where a suit was originally before a justice of the peace, and on appeal the parties went to trial without objection on a declaration for "money had and received" all objections to the form of the action and the jurisdiction of the justice are considered waived: *Woodring v. Forks Tp.*, 28 Pa. St. 355; 70 Am. Dec. 134. The county court on an appeal from a justice's court may alter the judgment according to the justice of the cases without regard to technical errors: *Brownell v. Winnie*, 29 N. Y. 400; 86 Am. Dec. 314, and note.

DIXON v. PLUNS.

[98 CALIFORNIA, 384.]

TRIAL—CHANCE VERDICT, WHAT IS.—A verdict arrived at by taking the average of such sums as the individual jurors shall deem to be adequate under the circumstances will be set aside, as being a chance verdict, if it appears that the amount thus obtained has been adopted in pursuance of a previous agreement that it was to represent the verdict, and not as the result of due consideration on the part of the jury and a determination that it was a just and proper verdict.

STATUTES, CONSTRUCTION OF.—RE-ENACTMENT OF A PROVISION of a former statute does not carry with it the construction placed by the courts upon such provision, unless the rules of statutory construction are the same at the date of both enactments.

CONTRIBUTORY NEGLIGENCE, WHAT IS NOT.—In an action to recover damages for an injury received through the falling of a chisel from a scaffolding, a motion for a nonsuit is properly denied, where the evidence shows that the plaintiff, at the time when he was thus injured, was upon a sidewalk along which people were constantly passing and that he had no sufficient reason to anticipate danger from overhead.

NEGLECT—HIGHWAYS—DUTY OF PERSONS WORKING ON SCAFFOLDING.—A person engaged with tools and materials upon a scaffolding erected directly over a thoroughfare where people are constantly traveling is required to exercise the greatest care in the performance of his work, so that passersby may not be injured, and evidence showing that the plaintiff, while traveling upon the sidewalk, was injured by the fall of a tool from the scaffolding is sufficient to establish a *prima facie* case of negligence against the person working thereon.

NEGLECT—INJURIES RECEIVED FROM FALLING OBJECTS IN PUBLIC THOROUGHFARES.—Evidence that an object whose fall has caused an injury to a traveler upon a public thoroughfare was under the management of the defendant or his servants is sufficient to establish a want of due care on the part of such defendant, if the accident is such as in the ordinary course of things does not happen, and no adequate explanation of its occurrence is offered.

H. C. Firebaugh, for the appellant.

Nagle and Nagle, for the respondent.

GAROUTTE, J. Respondent, while walking upon the sidewalk of Larkin street, in the city of San Francisco, was struck upon the head and quite seriously injured by a chisel that fell from a scaffolding above, upon which one of appellant's employees was standing while engaged in affixing a cornice to the building. Damages were recovered in the lower court, and the appeal is from the judgment and an order denying a new trial. This case was decided in Department, and the judgment and order reversed upon the ground that the verdict was arrived at by chance. The question involved being an important one, and there being some decisions of this court opposed to the doctrine there laid down, which had not been noticed in the opinion, the case was ordered to Bank for further consideration.

Appellant moved for a new trial upon the ground of misconduct of the jury in this, that they arrived at their verdict by a resort to the determination of chance. The code expressly provides that such misconduct may be shown by the affidavits of jurors: Code Civil Procedure, sec. 657; and in support of the motion appellant presented the affidavit of one Koster, a juror, wherein he stated: "That upon retiring to the juryroom the twelve jurors first agreed by a vote that the average sense of the jurors should control in arriving at what the verdict should be, and then the twelve jurors agreed to be controlled by their vote, and voted that the said average sense of the jurors should be arrived at in the manner following, namely, by each individual juror writing on a piece of paper what he would fix the verdict at, and that the sums so written should then be added together, and the aggregate divided by twelve, and that the amount resulting should be taken as the average sense of the jurors, and be put in the verdict accordingly; and thereupon the said plan was carried out," etc. Courts have not been astute in perceiving sufficient error to set aside verdicts upon the ground here relied upon, and evidence sustaining the verdict has been generally favored; but upon this motion no opposing affidavits were offered, and the merits of the contention rest alone upon the sufficiency of the statement of facts above recited. Reduced to its lowest terms, the affidavit plainly discloses that the verdict was the result of a previous agreement, and was arrived at upon the basis

that the amount of the verdict should be the quotient resulting from a division wherein twelve was the divisor, and the sum of the various amounts at which each juror would fix the verdict, the dividend. The calculation was made in pursuance of a prior agreement that the result should be the verdict, and that result was adopted as the verdict, not upon further consideration of the jury and upon the determination that such amount formed a just and proper verdict, but it was adopted in pursuance of the prior "agreement." The decisions of our courts clearly indicate that they do not countenance such procedure, and the verdict must be set aside if the affidavits of jurors are entitled to be received as evidence to prove the agreement and the consummation thereof, and that matter is dependent upon the solution of the question: Is the verdict a chance verdict within the meaning of the statute?

Counsel for respondent, with good reason, rely upon *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 397, to support his contention in this regard. It is there decided that a verdict arrived at in the manner hereinbefore set forth is not a chance verdict, and therefore cannot be attacked by the affidavits of jurors. But after mature consideration we think the principle there declared erroneous, and that the establishment of a contrary rule, in this country especially, where the rights of property, reputation, and life are all taken into the jury-room and there passed upon by jurors, will result in a purer and more satisfactory administration of justice. In the case cited Mr. Justice Sanderson used the following language: "To ascertain this average the jury may properly adopt the method which was used in the present case, but they ought not to agree to be bound by the result, whatever it may be. If they do so agree, and such result is made the verdict without further consideration or assent, such verdict is vicious and irregular, and must be set aside whenever the fact is made to appear by proper and competent evidence." If this character of verdict is vicious and irregular, it can only be vicious and irregular upon the ground that it was not the result of that calm and deliberate judgment of jurors contemplated by the law, but that it was arrived at by a resort to chance or lot. The vicious character of the verdict can consist of nothing else. The jurors have not been corrupted. They have acted under no duress, mistake, or fraud. Their verdict is the result of free and voluntary action. Outsiders have not

participated in or influenced their determinations. Hence, the verdict is vicious only in this, that the amount was determined by a resort to methods condemned by the law. In the few cases relied upon to support *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 397, it will be noticed that the verdicts were upheld upon the ground that after the computations were made and the result obtained, that result was not adopted as the verdict of the jury in pursuance of the prior agreement, but independently thereof, and upon further deliberation and thought, and as to such a course we see no serious objection.

"Chance" may be defined to be hazard, risk, or the result or issue of uncertain and unknown conditions or forces, and the facts here developed bring the case clearly within such definition. In the present case each juror agreed that a definite amount should be the verdict of the jury, at a time when he had no knowledge whatever as to what the amount should be, for it had not yet been computed. No person even knew the figures upon which the computation would be made. If the estimate of each juror is before the eyes of the others when the agreement is made, then no element of chance will be found in the result, for it would be a mere matter of mathematical computation; but without a knowledge of these estimates, the character of the verdict will be as entirely unknown to the jurors as though the whole matter were decided by the casting of a die, or the tossing of a coin. In the casting of a die, or the tossing of a coin, justice has an equal chance with injustice, but under the system here considered, one unscrupulous and cunning juror always has the power to defeat justice by increasing and decreasing the amount of the verdict in proportion as he places his estimate at an unconscionably high or low figure. In the casting of a die the chance of winning or losing is dependent upon the face of the die that presents itself after the cast. In arriving at a verdict in the manner here practiced, the chance of the respective parties, plaintiff and defendant, to secure the verdict is entirely dependent upon the sum total of the estimates made by the various jurors, and that sum total is as uncertain and unknown to the jurors at the time the agreement is made as the result of the cast is unknown to the gamester. We are clearly of the opinion that this verdict was obtained by a resort to chance, and *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 397, and other cases following in its wake, are no longer valuable as authority.

Under a statute similar to the provision of our code, this question has been directly adjudicated, and the position here taken supported in the recent case of *Pawnee Ditch and Improvement Co. v. Adams*, 28 Pac. Rep. (Col. App. Dec. 1891) 662. Under the same provision of the Idaho statute this question has been carefully considered in the very late case of *Flood v. McClure*, Idaho, Feb. 3, 1893. *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 397, is there reviewed, and its reasoning declared not sound.

It is insisted that the case of *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 397, having been decided under the former practice act, and the same provision being carried into the Code of Civil Procedure, that re-enactment carried with it the construction previously given the provision. Such can only be the law where the rules of statutory construction are the same at the date of both enactments. This principle is declared in *Blythe v. Ayres*, 96 Cal. 591, and also in *Flood v. McClure*, Idaho, Feb. 3, 1893.

As the cause must be returned to the lower court for further proceedings, we pass to an examination of some additional matters. The motion for a nonsuit was properly denied. Upon the evidence we cannot say that the respondent was guilty of contributory negligence in walking upon the sidewalk at the time the injury was inflicted. She had a right to be there, and had no sufficient reason to anticipate danger from overhead. Respondent's evidence also established a *prima facie* case of negligence upon the part of the appellant. He was engaged with tools and materials directly over a thoroughfare where people were constantly traveling and had an undoubted right to travel. Under such circumstances the law demanded of him more than ordinary care. He was called upon to exercise the greatest care and caution in the performance of his work in order that travelers might not be injured. The injury was received at the hands of appellant by the dropping of the chisel while respondent was walking upon the public street. Under the foregoing circumstances the court was justified in submitting the case to the jury. This question is carefully considered and the authorities reviewed in *Mullen v. St. John*, 57 N. Y. 567; 15 Am. Rep. 530. In that case the wall of a building fell upon a traveler in the street. The court held that the presumption of negligence arose from the fact of the building falling. In *Lyons v. Rosenthal*, 11 Hun, 46, the injury arose from the falling of a box of

goods from the story above, and it was held that negligence would be presumed. In support of this doctrine the court cited various English authorities which upon the facts stand upon common ground with the case at bar: See *Kearney v. Railroad Co.*, L. R. 5 Q. B. 411; *Byrne v. Boadle*, 2 Hurl. & C. 722; *Scott v. London etc. Dock Co.*, 3 Hurl. & C. 596. The rule recognized by the foregoing authorities as pertaining to this class of accidents is where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care; it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care: *Shearman and Redfield on Negligence*, sec. 60.

Inasmuch as counsel for respondent at the oral argument stated that he relied upon previous decisions of this court to the effect that affidavits of jurors would not be received to impeach a verdict arrived at in the manner set out in the affidavit of the juror in this case, and for that reason did not offer counter-affidavits upon the hearing of the motion for a new trial, which he could have done, it is ordered that the order denying a new trial be reversed, and the same remanded to the court below for further action as herein indicated; that the court below permit the respondent, if she shall be so advised, to file within twenty days after the filing of the remittitur counter-affidavits as to the manner in which the jurors arrived at their verdict, and that, thereupon, upon such affidavits and the other matters already before it upon the motion for a new trial, the court render its decision thereon. It is further ordered that the order heretofore made in this court submitting her appeal from the judgment be set aside, and that the hearing upon the said appeal be continued to a day to be hereafter fixed upon the motion of either party hereto.

McFARLAND, J., HARRISON, J., PATERSON, J., DE HAVEN, J., and BEATTY, C. J., concurred.

NEW TRIAL—CHANCE VERDICTS.—A verdict arrived at by each juror marking a sum as damages, the total of which constitutes a dividend, taking their own number as a divisor, and the quotient as their verdict, with a precedent agreement to abide by the result, will be set aside: *Goodman v. Cody*, 1 Wash. 329; 34 Am. Rep. 808, and note; *St. Martin v. Desmoyer*, 1 Minn. 156; 61 Am. Dec. 494. In *Village of Ponca v. Crawford*, 23 Neb. 662, 8 Am. St. Rep. 144, it was held that such a verdict would be upheld in the absence of an agreement by the jury to be bound by it, and see note to that case. See also the extended note to *Hilton v. Southwick*, 35 Am. Dec. 259.

NEGLIGENCE—INJURIES RECEIVED FROM FALLING OBJECT.—Where one, walking on a sidewalk in front of a building in course of erection, is struck by falling material and injured thereby, he may recover damages from the builder who neglected to build barriers to protect persons passing in front of the premises: *Jager v. Adams*, 123 Mass. 26; 25 Am. Rep. 7; *Mullen v. St. John*, 57 N. Y. 567; 15 Am. Rep. 530. The liability of the owner of a house for injuries caused by snow falling from a negligently constructed roof, is discussed in *Hannen v. Pence*, 40 Minn. 127; 12 Am. St. Rep. 717, and *Smethhurst v. Proprietors*, 148 Mass. 261; 12 Am. St. Rep. 550, and note with cases collected.

BURY v. YOUNG.

[98 CALIFORNIA, 446.]

DELIVERY OF A DEED IS SUFFICIENTLY ESTABLISHED where the trial court finds that the grantor placed it in the hands of a third party, instructing him to hold it for the grantee without recording it until the grantor's death, and thereupon to deliver it to the grantee, and that the grantor parted with all dominion over the deed, and reserved no right to recall it, nor to alter its provisions, or to have or enjoy any other or further interest in said premises than to hold the use thereof until his death.

DEEDS DELIVERED AFTER GRANTOR'S DEATH, WHEN VALID.—The essential requisite to the validity of a deed which is given to a third party with instructions to deliver it to the grantee after the grantor's death, is, that when it is placed in the hands of such third party, it shall pass beyond the control of the grantor for all time. Whether control over it has been surrendered is determined by the grantor's intention in the matter, such intention being a question of fact, to be solved by the light of all the circumstances surrounding the transaction.

DELIVERY OF DEED, EVIDENCE INADMISSIBLE TO DISPROVE.—Where a deed is given to a third person to be delivered to the grantee after the grantor's death, and the circumstances contemporaneous with the transfer showed that the grantor intended to surrender his control over the instrument, evidence that he afterwards executed other deeds purporting to convey the same property, and that he also ordered the depository to restore the deed, is incompetent for the purpose of showing what his intentions were in transferring the deed to such depository.

T. A. Coldwell, John W. Armstrong, and L. J. Maddux, for the appellants.

C. C. Wright, for the respondent.

GAROUTTE, J. This is an action of partition. Plaintiff and defendant Young are sisters, and also daughters of one M. A. Hinkson. For title to support their respective claims Mrs. Bury relies upon a deed from her father, and Mrs. Young claims as a devisee under her father's will. While suffering from a paralytic stroke, Hinkson called to his bedside for legal advice, as to the disposition of his property, one Hazen,

an attorney at law, and acting upon his advice he signed and acknowledged a grant deed of his real estate, wherein his aforesaid daughters were named as grantees. This deed he gave to Hazen, with instructions not to record it, but to deliver it to the grantees upon his death. He appears to have recovered from his sickness, and subsequently endeavored to secure possession of the deed from said Hazen, but was unsuccessful in this regard. At a later date he made a will devising all his real estate to appellant Young. Subsequently he died, and Hazen delivered the aforesaid deed to plaintiff Bury.

The sole question in this litigation is, Did the title pass to the grantees under the deed—in other words, was there a delivery of the deed by the grantor? The findings of the court as to the matter of delivery are fully supported by the evidence of the witness Hazen, and it is as to the sufficiency of those findings of fact to support a delivery of the deed that our attention will be directed. The findings are as follows:

1. That on the day last named the said M. A. Hinkson delivered the said deed to P. J. Hazen, Esq., of Modesto, California, for the said plaintiff and defendant last named, and instructed the said Hazen to hold the same for said plaintiff and defendant without recording it until his, the said M. A. Hinkson's, death, and thereupon to deliver the same to the said plaintiff and defendant.

2. That the said M. A. Hinkson then and there parted with all dominion over said deed, and reserved no right to recall it or to alter its provisions, or to have or enjoy any other or further interest in said premises than to hold the use thereof until his death.

If the question here presented were a new one, or if the decisions of the courts of our sister states might be fairly said to divide as to what was the true rule of law applicable to such case, speaking for myself alone, I am not prepared to say but that the judgment in this case should be reversed for the reason that the aforesaid findings indicate upon the part of the grantor an intention to make a *post mortem* disposition of his property, and such a thing cannot be done by deed; but the decisions of the courts of many states, promulgated by the most learned judges of those states, hold that the facts stated in the findings quoted constitute a valid delivery of the deed, and that the fee-title forever passed from the grantor, and we deem the law settled in that regard. It may be

conceded that the roads traveled by courts in arriving at the conclusion have not always been the same, but whatever may have been the various lines of reasoning pursued, the same result has always been reached, and a valid delivery declared. We shall not enter into a discussion of the elementary principles of law supporting the proposition here involved, but content ourselves with a reference to the views of various courts as to the law applicable to the state of facts here presented.

In the well-considered case of *Cook v. Brown*, 34 N. H. 460, the decision of the court upon this question concludes as follows: "If the owner of land desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed, or it may be done by the absolute delivery of the deed to a third person to be passed to the grantee upon the decease of the grantor, the holder in such case being a trustee for the grantee." In *Prutsman v. Baker*, 30 Wis. 650, 11 Am. Rep. 592, Dixon, C. J., speaking for the court, approved the doctrine cited from *Cook v. Brown*, 34 N. H. 460, and declared the same rule in the following language: "As to the grantor, delivery is absolute and final, and so is his conveyance of the land, the title to which passes at once to the grantee, qualified only by the right of the grantor to use and occupy, or take and receive the rents and profits during his life, or until the event shall have happened upon which second delivery be made. The grantor in such case converts his estate into a life tenancy, and makes himself the tenant of the grantee. These conclusions result unavoidedly from the certainty of the event upon which the second delivery is made to depend, and from the impossibility under the circumstances that the grantor will ever be able to recall or repossess himself of the deed. He delivers the writing, therefore, as his deed, always so to remain, and never to return to him, and it becomes presently operative and the title vests immediately in the grantee." In *Wheelwright v. Wheelwright*, 2 Mass. 446, 3 Am. Dec. 66, Parsons, C. J., in speaking of the question of delivery of a deed by the depositary to the grantee after the death of the grantor, said: "If a grantor deliver any writing as his deed to a third person, to be delivered over by him to the grantee on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee, and if the grantee obtain the writing from the trustee before the event

happens, it is the deed of the grantor, and he cannot avoid it by a plea of *non est factum*, whether generally or specially pleaded." In *O'Kelly v. O'Kelly*, 8 Met. 439, Shaw, C. J., said: "That a deed was made, executed, and acknowledged by the ancestor was proved. The question was whether it was delivered so as to take effect and pass the estate. If it was delivered by the grantor to any person in his lifetime, to be delivered to the grantee after his decease, it was a good delivery upon the happening of the contingency, and related back so as to divest the title of the grantor by relation from the first delivery." In *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, Campbell, C. J., speaking for the court, said: "The other deed held by Mallory depends upon other considerations. If the deed had been delivered to him irrevocably, on the simple condition that he should transfer it to defendant on the death of Aden Taft, it would come within several of our own decisions, and might, therefore, be valid upon their authority: *Latham v. Udell*, 38 Mich. 238; *Wallace v. Harris*, 32 Mich. 380. There is much authority elsewhere in favor of the same doctrine."

The foregoing principles are also approved in *Stephens v. Rinehart*, 72 Pa. St. 434; *Hathaway v. Payne*, 34 N. Y. 92; *Stone v. Duvall*, 77 Ill. 475, and many cases from other states not necessary to mention.

Upon a careful examination of the authorities cited by appellant, and other cases bearing upon this question not cited, we have failed to find a case supporting a contrary doctrine to that announced in the foregoing citations. In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument; that he failed to part with all control and dominion over it; that upon the happening of some event, or contingency, or condition, he had the right, if so disposed, to reach out and take it from the possession of the depositary. Such is not the case under consideration, for here the court finds as a fact that "the grantor parted with all dominion over said deed." There are well-considered cases holding that, even though the grantor delivers the deed to the depositary, reserving the right to recall it, yet if he dies without recalling it, and the deed is then delivered, that such delivery is complete and entire, and carries title. We are not disposed to indorse that doctrine, and think the principle recognized in this case goes far enough for all proper

purposes. The essential requisite to the validity of a deed transferred under circumstances as indicated in this case, is that when it is placed in the hands of the third party it has passed beyond the control of the grantor for all time. That question is determined by the grantor's intention in the matter, and his intention in making the delivery is a question of fact, to be solved by the light of all the circumstances surrounding the transaction.

As before intimated the views of courts are not uniform as to how and when the deed takes effect. *Prutsman v. Baker*, 30 Wis. 650, 11 Am. Rep. 592, says the title passes full and complete upon the first delivery, and that the depositary becomes the trustee of the grantee, and that the grantor holds a life estate in the property. *Stone v. Duvall*, 77 Ill. 475, holds the first delivery to be an inchoate delivery. Many of the cases declare that the deed becomes operative upon the delivery by the depositary after the death of the grantor, and that such delivery relates back to the first delivery for the purpose of carrying the title. Section 767 of the Civil Code provides that a freehold may commence *in futuro*, and for that reason we are inclined to recognize the views of Dixon, C. J., in *Prutsman v. Baker*, 30 Wis. 650, 11 Am. Rep. 592, as the true rule applicable to this class of cases in this state. We know of nothing in the codes forbidding the doctrine announced in that case, to wit, that the grantor, upon the irrevocable delivery of the deed to the depositary, thereupon constitutes such depositary the trustee of the grantee, and creates in himself a tenancy for life.

Appellant offered in evidence a deed from M. A. Hinkson to A. C. Hinkson, and a deed back to M. A. of the realty here involved. These deeds were made subsequent to the deed which we have had under consideration, and were offered as tending to show the grantor's intentions at the time he made the original deed. The proposed evidence was rejected, and rightly so. The consideration in both deeds was nominal. They were executed about the same time, and were recorded upon the same day. It was a very poor attempt upon the part of the grantor to create evidence in his own favor. Neither was the grantor's order upon the depositary to redeliver the deed to him proper evidence. If offered as tending to show a revocation of agency, it was immaterial, as the fact of revocation was not involved in the case. The question involved was the power of the grantor to revoke or recall the

deed. Appellant also offered in evidence a trust deed to the Sacramento bank, made some months subsequent to the delivery of the deed to Hazen, as tending to show the grantor's intentions in making the original deed, and it is now claimed that such an act upon the part of the grantor would be so inconsistent with an intention on his part to part with the title when he made the original deed that it should be admitted as throwing light upon that transaction. It was not even shown that the deed to the bank was a *bona fide* one; but aside from that a grantor cannot be allowed to undermine his deed either by words or acts. His declarations and acts made and done in his own interest months after the deed was delivered are not admissible as indicating his intentions in delivering the deed. We think this principle elementary, and there is nothing in *Dean v. Parker*, 88 Cal. 283, trespassing upon that doctrine.

For the foregoing reasons let the judgment and order be affirmed.

HARRISON, J., FITZGERALD, J., and PATERSON, J., concurred.

McFARLAND, J. (dissenting). I dissent. In the first place I think the evidence fails to show that when Hinkson handed the deed to Hazen he parted with all control over it, etc., and also that the court erred in ruling out certain evidence offered for the purpose of showing what Hinkson's intention was. Furthermore there was no delivery of the deed to the grantees named therein while the grantor was alive; and there could have been none after he was dead. It is contended that giving the deed to Hazen was a present delivery to the grantees; but the express instruction was that he was to keep it until after Hazen's death, and then to deliver it to the grantees, so that the delivery to the grantees was not to take place during Hinkson's lifetime. Hazen was not a grantee, and had no interest in the grant. He was a mere agent of Hinkson, and upon the death of the latter the agency ceased. The deed was a mere attempt at testamentary disposition of property, and not being in the form prescribed for the execution of a will was void. He ordered his agent to return the deed to him, and the agent should have obeyed; for if it was of any value he had as much right to revoke it as he would have had to revoke a will. But it was of no value, for it provided for an impossible thing—the delivery of a deed by an agent.

after the death of his principal. If one desires to avoid the administration of his estate in probate he may grant his property to a trustee, to whom a present delivery of the deed must be made; or he may grant his property reserving a life estate, but there must be a present delivery of the deed to the grantees. The method of doing so, claimed to be effective in the case at bar, would not only lead to innumerable frauds, but is inconsistent with the fundamental principle that a dead man can do no act, and can have no agent to act for him. There are authorities, no doubt, holding differently from the views above expressed, but in my opinion they do not correctly declare the law, and should not be followed. I think the judgment should be reversed.

DEEDS—DELIVERY TO THIRD PERSON TO HOLD UNTIL GRANTOR'S DEATH.—A deed delivered by the grantor to a third person to be delivered to the grantee, and by such person so delivered, is valid, though the grantor is dead at the date of the last delivery: *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and note; *Hinson v. Bailey*, 73 Iowa, 544; 5 Am. St. Rep. 700, and note; note to *Wellborn v. Weaver*, 63 Am. Dec. 246; but see *Weisinger v. Cock*, 67 Miss. 511, 19 Am. St. Rep. 320, where it was held that if such person was an agent of the grantor the delivery would be insufficient.

DEEDS.—DELIVERY AFTER GRANTOR'S DEATH: See extended note to *Wellborn v. Weaver*, 63 Am. Dec. 246. It is an essential feature of every delivery of a deed, whether absolute or conditional, that there should be a parting with the possession of it and with the power and control of it by the grantor for the benefit of the grantee at the time of the delivery: *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131, and note; *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and especially note in which it is maintained by the authorities therein cited that there can be no delivery of a deed after the death of the grantor.

RICO v. BRANDENSTEIN.

[98 CALIFORNIA, 465.]

HUSBAND AND WIFE—CONVEYANCE OF WIFE'S SEPARATE PROPERTY TO HUSBAND.—The enactment of the California statute of 1850 defining the rights of married women with respect to their separate property removed the common-law impediment to a voluntary conveyance from the husband to the wife, but left unaffected the husband's incapacity to take by deed of gift directly from his wife.

HUSBAND AND WIFE.—HUSBAND CANNOT BE MADE TRUSTEE OF WIFE'S SEPARATE PROPERTY BY CONVEYANCE FROM HER by virtue of a statute which merely provides that a wife may convey her real estate by a deed executed by herself and her husband. A trust is valid only to the

extent of the legal capacity of the person creating it, and if the wife cannot lawfully convey her separate property directly to her husband no title vests in him under a deed which purports to transfer such separate property to him to be held in trust for the benefit of his and her children.

Pillsbury, Blanding, and Hayne, for the appellants.

Edward R. Taylor, Reinstein and Eisner, and James M. Seawell, for the respondents.

SEARLS, C. Appeal from a judgment in favor of defendants, and from an order denying a motion for a new trial.

The action was brought for a partition of the southeast two-thirds of the Rancho San Bernardino, situate in the county of Monterey. The two plaintiffs claim to be the owners of an undivided one-eighth, each as tenants in common, with defendants, Brandenstein and Godchaux, who are averred to be each the owner of an undivided three-eighths in said rancho. The answer denies the ownership of plaintiffs, or that they were ever tenants in common with defendants, and avers ownership in defendants to the entire tract of land except as to certain lots conveyed by them to third parties. The area of the land in question is eight thousand nine hundred and one and twenty-five one-hundredths acres. Francisco Rico the father of the plaintiffs, on the tenth day of January, 1855, became the owner of the premises in controversy, and on August 27, 1855, conveyed the same by deed to Tomasa Sepulveda Rico, his wife. The title asserted by plaintiffs in the action rests upon a deed of trust of the premises, dated November 9, 1857, executed by Francisco Rico and Tomasa Sepulveda Rico, his wife, as parties of the first part, to the said Francisco Rico, as party of the second part. The deed purports to be in consideration of fifteen thousand dollars, paid to the parties of the first part by Theodora Gonzales and Jose Sepulveda, the receipt of which is acknowledged, and which the proofs show was actually paid. The remaining portions of the deed important to the inquiry are as follows: "And by these presents doth bargain, sell, remise, release, and quitclaim and convey unto Francisco Rico, in trust for and the use, interest, behoof, benefit of Guadalupe Rico, Francisco Rico, Junior, Vicente Rico, and Alexander Rico, all being legitimate children of the parties of the first part hereof, . . . all now living, and all other offspring that may be born hereafter of the said parties of the first

part thereof, all the right, title, and interest of the parties of the first part hereof in and to This conveyance is intended as a deed of trust, to be held by the said Francisco Rico, under the express conditions hereinafter set forth; that is to say, to hold the same aforementioned premises to and for the uses, interests, and purposes of the said minors, Guadalupe, Francisco, Vicente, and Alexander Rico, now living, and also all other children that may be born hereafter of the said parties of the first part hereof, to receive the rents, issues, and profits of the said lands and improvements thereon, and apply the same to the use and benefit of the said aforementioned children now living, and all others that may be born hereafter of the said parties of the first part hereof during their natural lives." Then follows a clause authorizing the said Francisco Rico to appoint his successors as trustee of said property for said children during his lifetime and by will after his death. The trustee and beneficiaries are forbidden to sell, pledge, or hypothecate the land and premises described in the deed. The deed was duly acknowledged and recorded in the office of the county recorder of the county of Monterey, November 9, 1857.

Francisco Rico, the grantee of the deed of trust, was one and the same person with Francisco Rico, one of the grantors, and the grantors were husband and wife. The plaintiffs herein were their children, born subsequent to the execution of the deed of trust. Defendants Brandenstein and Godchaux hold the premises under a conveyance in trust, executed by the same grantors in 1862 to third parties as trustees.

It was admitted at the trial for the purposes of the case that if plaintiffs are not the owners of two-eighths of the rancho, defendants are the owners thereof.

The first question presented by the record relates to the validity of the deed from Rico and wife to the husband. It must be assumed that at common law the wife could not convey her separate property to her husband. The contention of appellant is, that conceding the property to have been the separate property of the wife, still, at the time of the deed, there was under the statute of this state no restriction upon such a conveyance.

Section 14 of article 11 of the constitution of this state, adopted October 10, 1849, provided that "all property, both real and personal, of the wife, owned and claimed by her before marriage, and that acquired afterward by gift, devise, or

descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband." By an act approved April 17, 1850, the legislature, in obedience to the requirements of the constitution, passed a law by which the husband was given "the management and control of the separate property of the wife during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or encumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband before," etc. The seventh section of the same act provided, "that when any sale shall be made by the wife of any of her separate property for the benefit of her husband, or when he shall have used the proceeds of such sale with her consent in writing, it shall be deemed a gift, and neither she nor those claiming under her shall have any right to recover the same": Stats. 1850, p. 254. An act concerning conveyances, passed April 16, 1850, provides as follows:

"Sec. 19. A married woman may convey any of her real estate by any conveyances thereof, executed and acknowledged by herself and her husband, and certified in the manner hereinafter provided by the proper officer taking the acknowledgment." A number of other statutes might be referred to tending to indicate the evident policy of our lawmakers, to loosen the chains which bound married women at the common law, and, so far as their separate property is concerned, to confer upon them like power of alienation with that possessed by their husbands. Step by step the work has gone on until now "a conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner": Civ. Code, sec. 1189.

We are dealing, however, with a question which depends not upon the present condition of the law, but upon the *status* and rights of married women as they existed in 1857, the date of the deed under consideration. No question is made here as to the due execution of the deed by the husband and wife, or that it was properly acknowledged as required by statute. The contention of respondents in this behalf is that the deed is void, because at the date of its execution, to wit, November 9, 1857, a married woman could not convey real property directly to her husband. The husband was required

to join in the conveyance. The objects of the statute in requiring the husband to join with his wife in the conveyance of her separate property, as it has been said, was to afford her his protection against imposition and fraud, and to aid her by his counsel and advice; *Meagher v. Thompson*, 49 Cal. 190. The requirement of the statute is analogous to the rule of the civil law, under which the wife must have the authorization of her husband, or a decree of a judge, before she could convey any of her rights or enter into a civil contract. The wider experience of men in business affairs, their better opportunities for becoming conversant with property values, and the mode of its transfer, as well as the important object of promoting unity of purpose and harmony of action in the close relation existing between husband and wife, may well have conduced to the enactment of the law requiring them to join in a conveyance of property, which, while belonging to the wife, was yet subject to the management and control of the husband. The law required them to join in the conveyance, and there is no disposition to question either its wisdom or its binding force, and these remarks are only indulged as tending to a better understanding of the cognate question, Can the husband and wife convey her separate real property to the former?

This court has repeatedly decided that a husband, when free from debt, may make a gift to his wife of either his separate property or of the community property of the husband and wife: *Barker v. Koneman*, 13 Cal. 9; *Peck v. Brummagim*, 81 Cal. 441; 89 Am. Dec. 195; *Dow v. Gould etc. Co.*, 81 Cal. 653; *Woods v. Whitney*, 42 Cal. 361; *Higgins v. Higgins*, 46 Cal. 263. It does not necessarily follow that the converse of the proposition is true, and that the wife can convey by way of gift to her husband. If, however, she cannot do so, or rather, if she could not do so under the law we are considering, viz., the statute in force in 1857, it must be because of the inherent condition of the parties as husband and wife.

The owner of property competent to convey may convert himself into a trustee by making a proper declaration of the trust in writing: *Suarez v. Pumpelly*, 2 Sand. Ch. 336; *Pinkett v. Wright*, 2 Hare, 120. A trust is valid only to the extent of the legal capacity of the one creating it: *Tiffany and Bullard on Trusts and Trustees*, p. 2. Any person may create a trust who is capable of making a valid distribution of property. The power to dispose of property involves the right to

attach such limitations to the act of disposition as will vest the legal estate in one and the beneficial interest in another. At common law neither husband nor wife could convey property directly to the other. The power to alienate and to take property on the part of the husband was unaffected by marriage, except in the single instance of conveyances to and from his wife. To the wife the common-law system was a source of constant repression. Her husband became the absolute owner of her personal property, and was entitled to the rents, issues and profits of her real estate. To relax the severity of the rules of her environment as a wife, many of the states have adopted laws similar to the one under consideration, empowering her to convey her real property by joining with her husband in the deed of conveyance, and in a few of the states, New York and California (since 1891) included, a conveyance by a married woman may be made in the same manner, and has the same effect as if she were unmarried. Under these laws, however, the courts in numerous instances still adhere to the doctrine that the wife cannot convey her property directly to her husband.

The general result of the reasoning of the cases may be summarized as follows:

1. These statutes are for the benefit of married women and not for that of their husbands; and any construction which would result in making it more easy for the husband to secure control of the estate of the wife would tend to defeat the very object of the law.

2. The inhibition of the common law, as applied to the husband, was that he could neither convey to his wife directly or be a grantee from her; and while the right of the wife to take by gift removes the impediment to a voluntary conveyance from the husband to her, yet the right to receive such voluntary conveyance from the wife has not been conferred upon the husband, and he stands as at common law incapacitated from taking by deed of gift directly from his wife.

3. The "power to convey and devise real and personal property as if she was unmarried" does not enlarge the powers of the grantees under conveyances by her, and she could not devise to a corporation or person incapable of taking by will, or convey to one incompetent to be a grantee.

4. To render a conveyance from the wife to her husband valid, the husband's common-law disability, as well as that of the wife, must be removed: *White v. Wager*, 25 N. Y. 828;

Brooks v. Kearns, 86 Ill. 547; *Scarborough v. Watkins*, 9 B. Mon. 545; 50 Am. Dec. 528; Card's Legal and Equitable Rights on Married Women, sec. 428; Am. & Eng. Ency. of Law, title "Husband and Wife," p. 794; Bishop on Married Women, secs. 711, 712; *Kinnaman v. Pyle*, 44 Ind. 275; *Winans v. Peebles*, 32 N. Y. 423; *Sims v. Rickets*, 35 Ind. 181; 9 Am. Rep. 679.

I find no case extant in which under a statute requiring the husband and wife to join in the conveyance of her separate property, a sale and conveyance from the latter to the former has been sustained. The law having provided for the joinder of the husband in this class of conveyances, with a view, as has often been declared by this court, of giving the wife the benefit of the husband's counsel, advice, and judgment, it would seem strange and illogical to permit him at the same time to act as her opponent, as one working against her interests and seeking to obtain her land for himself, either with or without limitations upon the effect of the conveyance.

In Colorado, Iowa, and some other states, statutes have been passed giving to married women the same rights of alienation of their separate property as those enjoyed by unmarried women. Where such laws prevail we may reasonably expect to see their right to convey directly to their husbands as well as to others finally upheld, as has already been done in a number of cases: *Wells v. Caywood*, 8 Col. 487; *Simms v. Hervey*, 19 Iowa, 287; *Robertson v. Robertson*, 25 Iowa, 850; *Allen v. Hooper*, 50 Me. 871; *Burdens v. Amperse*, 14 Mich. 91; 90 Am. Dec. 225.

The views herein enunciated are expressly confined to an interpretation of the statute as it existed prior to the amendment of 1891, and are not intended as an exposition of the rights of married women under the broader *egis* of that amendment.

I am of opinion that under the law as it existed in 1857, the husband and wife could not legally convey her separate real estate to the husband, and that the deed of trust to the latter, set out in the record, was void.

This view renders a consideration of the other points made in the case unimportant.

The judgment and order appealed from should be affirmed.

TEMPLE, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

HARRISON, J., GAROUTTE, J., PATERSON., J.

HUSBAND AND WIFE—CONVEYANCE OF WIFE'S SEPARATE PROPERTY TO HUSBAND.—During coverture the wife cannot by deed convey her separate property to him: *Graham v. Stuve*, 76 Tex. 533. This question is fully treated in the monographic note to *Turner v. Shaw*, 9 Am. St. Rep. 323.

TRUSTS—EFFECT OF TRUSTEE'S DISABILITY.—The fact that a trustee is incompetent to act does not render the trust deed void, as a court of competent jurisdiction may appoint a new trustee to carry out the trust: *Smith v. Davis*, 90 Cal. 25; 25 Am. St. Rep. 92; *Seda v. Huble*, 75 Iowa, 429; 9 Am. St. Rep. 495.

MAGEE v. PACIFIC IMPROVEMENT COMPANY.

[93 CALIFORNIA, 678.]

INNS AND INNKEEPERS.—In an action brought by the inmate of a hotel to recover the value of certain personal property destroyed by the burning of such hotel, the question whether the plaintiff was a guest or a boarder is an issue in the case, upon which the liability of the defendant depends, and upon which the court should make an express finding.

INNS AND INNKEEPERS.—WHETHER AN INMATE OF A HOTEL IS A GUEST OR A BOARDER is a question of fact to be determined by the trial court upon all the evidence before it. That the plaintiff made a special arrangement respecting his sojourn is not conclusive of the question, but merely a circumstance to be considered in connection with all the evidence from which the ultimate fact is to be decided.

INNS AND INNKEEPERS.—SPECIAL ARRANGEMENT WITH INNKEEPER is not established merely by proving that there was a rule of the house to charge an inmate a less rate *per diem* for entertainment by the week than by the day, and that, if a guest remained more than a week, he got the benefit of the rule, no evidence being offered that the rule was ever brought to the knowledge of the inmate, or that he was ever informed of the rates charged under different circumstances, or that there was at any time something said or done with reference to the period over which the sojourn was to extend.

CORPORATIONS—ULTRA VIRES, PLEA OF, WHEN NOT ALLOWED TO PREVAIL.—A corporation which engages in the occupation of an innkeeper, assumes the liability of an innkeeper towards a guest, and receives from such guest the consideration for that liability, cannot repudiate its obligation upon the ground that, under its corporate powers, it was not authorized to engage in such occupation.

Blake, Williams, and Harrison, for the appellant.

A. B. Hotchkiss, for the respondent.

HARRISON, J. This action was brought to recover from the defendant the value of certain personal property lost by the burning of the Hotel del Monte, April 1, 1887. Judgment was rendered in favor of the defendant, and the plaintiff has appealed.

It was held in *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 27 Am. St. Rep. 198, upon the facts then before the court, that

the defendant, as the proprietor and keeper of the Hotel del Monte, was an innkeeper, and as the facts herein are almost identical with those presented in that case, the defendant must in the present case be held to have been an innkeeper, and subject to its liabilities. It is, however, contended by the defendant that in the present case the plaintiff was a "boarder" with it rather than a "guest," and consequently that its liability as an innkeeper does not exist. The finding of the court upon this issue is as follows: "That plaintiff and her assignor at the time of the destruction of said house by fire were inmates of said house under special arrangement for board and lodging by the week for a permanent stay, and at the time of the fire had given no intimation to defendant of any intention to depart from said house, where they had been for about ten days."

The appellant contends that this finding is not sustained by the evidence, and we are of the opinion that her contention is correct. The plaintiff testified that there was no special contract made between her and the management of the hotel as to the terms upon which she was received; that she simply went into the office, asked for a room, registered, and was assigned to the room; and instead of there being any testimony in conflict with this statement, it was corroborated by testimony given on behalf of the defendant by its clerk and manager. The only evidence which it is contended supports the above finding is that it was shown to be a rule of the house to charge a guest a less rate *per diem* for entertainment by the week than by the day, and that if a guest remained more than a week he got the benefit of the rule; that they treated all persons as transient guests until they remained a week, and then they commenced to treat them as boarders and charged them the weekly rates; and that the plaintiff had been at the hotel about ten days at the time of the fire. It was not shown, however, that this rule was ever brought to the knowledge or notice of the plaintiff, or that she was ever informed of the rates of charge, the only evidence upon that subject being that she always paid all demands that were made on her for her entertainment; and the defendant's manager testified that nothing was said when they came in about whether they came there by the day or otherwise. There was no evidence whatever that the plaintiff made any arrangement "for a permanent stay," or that there

was at any time anything said or done with reference to the time that she would remain at the hotel.

Whether the plaintiff was a guest or a boarder with the defendant was an issue in the case upon which the liability of the defendant depended, and upon which the court should have made an express finding. This question was one of fact to be determined by the court upon all the evidence before it. Whether the plaintiff made a special arrangement respecting her stay with the defendant was only evidence to be considered by the court in determining the ultimate fact whether she was a guest or a boarder. Even if the finding of the court that she had made a special arrangement with the defendant for board and lodging by the week had been sustained by the evidence, that fact would not be determinative of the issue whether she was a guest or a boarder, but would be merely evidence to be considered in determining that issue: *Pinkerton v. Woodward*, 33 Cal. 597; 91 Am. Dec. 657; *Hancock v. Rand*, 17 Hun, 279; 94 N. Y. 1; 46 Am. Rep. 112; *Hall v. Pike*, 100 Mass. 495.

The proposition of the defendant, that because innkeeping is not enumerated as one of the objects of its incorporation, its acts as an innkeeper are *ultra vires*, and cannot form the basis of any liability therefor, cannot be maintained. Having engaged in that occupation, and assumed the liability of an innkeeper towards the plaintiff as his guest, and received from her the consideration for such liability, the defendant cannot now repudiate its obligation upon the ground that under its corporate powers it was not authorized to engage in such occupation.

The judgment is reversed, and a new trial is ordered.

McFARLAND, J., GAROUTTE, J., and DE HAVEN, J., concurred.

INNS—"GUESTS" AND "BOARDERS"—WHO ARE AND HOW DETERMINED.— This question is fully discussed in *Fay v. Pacific Imp. Co.*, 93 Cal. 253; 27 Am. St. Rep. 198, and note; and *Pullman etc. Car Co. v. Lowe*, 28 Neb. 239; 26 Am. St. Rep. 325. See also extended note to *McDaniels v. Robinson*, 62 Am. Dec. 586.

CORPORATIONS—WHEN PLEA OF ULTRA VIRES WILL NOT AVAIL.— The plea of *ultra vires* should not be allowed to prevail as a defense to an obligation incurred by a corporation where the contract has been in good faith performed by the other party, and the corporation has received the benefit of it: *Linkauf v. Lombard*, 137 N. Y. 417; 33 Am. St. Rep. 743, and note with the cases collected: *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550; 30 Am. St. Rep. 454, and note.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

GARDNER v. STATE.

[90 GEORGIA, 810.]

MURDER.—EVIDENCE OF BAD CHARACTER OF DECEASED is admissible in trials for murder only when it is shown, *prima facie*, that the accused had been assailed, and was honestly seeking to defend himself at the time when the crime was committed.

MURDER.—EVIDENCE OF BAD CHARACTER OF DECEASED.—When, on a trial for murder, it appears that the accused, when the homicide was committed, was not endeavoring to defend himself, but was making and following up an attack which was altogether unnecessary for the immediate protection of his life or person, and there was nothing to reduce the homicide to any grade of manslaughter, or to justify it, evidence of the violent and desperate character of the deceased is not admissible. Such evidence is only admissible to throw light upon the guilt or innocence of the accused, and for the purpose of properly grading his crime.

MURDER.—EVIDENCE OF BAD CHARACTER OF DECEASED, when not admissible, either to justify or mitigate a homicide, is not admissible for the purpose of grading the crime, or fixing the punishment.

MURDER.—THREATS—EFFECT OF EVIDENCE OF BAD CHARACTER OF DECEASED. Although within a few hours before the time of the homicide the deceased threatened to take the prisoner's life, of which threat the prisoner had knowledge, and although only a few moments before he was slain the deceased was in the public street armed with a pistol, and approaching the prisoner with the probable purpose of executing his threats, yet if, while he was struggling with another person who had arrested him and was endeavoring to take the pistol away from him, the prisoner, seeing the struggle in progress, voluntarily ran up and shot the deceased whilst the latter was engaged with the third person, and not in a situation to make any direct attack upon the prisoner, and if, after being wounded, the deceased abandoned his pistol and fled from the street into a house, and the prisoner pursued him and in the house inflicted the mortal wound by shooting again without any apparent necessity, the bad character of the deceased for violence would afford no substantial aid to the jury in deciding whether the prisoner acted from malice, or from a bona

facie motive of self-preservation; and for this reason evidence of such bad character is not admissible.

MURDER—INSTRUCTIONS AS TO MANSLAUGHTER.—When, on a trial for murder, there is nothing in the evidence to fairly raise the question as to whether or not the crime committed is manslaughter, the court need not charge the jury on that degree of homicide.

MURDER—OPINION AS EVIDENCE.—On a trial for murder the opinion of a witness as to what the deceased intended to do with a pistol for the possession of which he was struggling with a third person prior to the killing is not admissible in evidence.

INDICTMENT and conviction of Candus Gardner for the murder of one Minifield. Candus appealed, assigning as error the refusal of the court below to allow a witness to testify to the general reputation of the deceased for violence; also that the charge of such court excluded from the jury the question whether or not, under the evidence, the defendant was guilty of manslaughter; also the refusal of the court to charge that if the jury believed from the evidence and circumstances of the case that at the time of the killing the defendant believed, acting under the fears of a reasonably courageous man, that the deceased intended to inflict upon him a personal injury less than a felony, the killing would be voluntary manslaughter only; also the refusal of the court to allow a witness to state, "What was your opinion from the fact of deceased's struggling with Gilbert Williams for that pistol; what did you think he was going to do with it?" This witness had already detailed the facts attending the struggle between the deceased and said Williams for the possession of a pistol, and had testified to threats made by the deceased to take the life of the defendant and communicated to the latter shortly before the killing. The remaining facts appear from the fourth head-note above.

Harris and Sparks, and Deseau and Bartlett, for the plaintiff in error.

W. A. Little, attorney-general, and J. H. Lumpkin and W. G. Brantley, solicitor-general, for the state.

BLECKLEY, C. J. In *Doyal v. State*, 70 Ga. 147-149, this court recognized the doctrine that the character of the deceased for violence is admissible in evidence only where it is shown *prima facie* that the accused had been assailed and was honestly seeking to defend himself. In addition to the authorities on the subject cited by Hall, J., in that case, see 1 Criminal Defenses (Horrigan and Thompson), 618-696. In

the present case it is manifest that the accused, when the homicide was committed, was not endeavoring to defend himself, but was making and following up an attack which was altogether unnecessary for the immediate protection of his life or person. There is no doubt or obscurity in reference to the facts and circumstances; the evidence is not conflicting. At the time the mortal wound was given not only was the accused in no immediate danger of any injury, but there was nothing to excite the fears of a reasonable man that any such danger existed. However desperate the character of the deceased for violence may have been, there was nothing to reduce the homicide to any grade of manslaughter, much less to justify it. There was consequently no evidentiary purpose for his bad character to subserve, and the evidence to establish it was properly rejected. When such evidence is admissible at all, its primary object must be to throw light upon the guilt or innocence of the accused, including, of course, the proper grading of his offense should he be guilty of any. When the jury have it before them for this purpose they may use it as a guide in recommending or forbearing to recommend as to the punishment; but we wholly repudiate the doctrine inculcated by the case of *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771, that it may be received and used for the latter purpose only when inadmissible for the former. The law considers the murder of a bad man no less criminal than the homicide of a good one. All lives are equal: the life of the best is no more sacred against the crime of murder than the life of the worst. When character is not relevant as evidence either to justify or mitigate a homicide, it has no relevancy to the question of punishment. Its tendency to negative or mitigate guilt is the sole reason for considering it in mitigation of punishment; and when that tendency is so completely absent as to require its exclusion on the principal question, the incidental question is disposed of. Any recommendation which the jury are competent to make as to punishment is to be made upon such facts as are admissible upon the inquiry as to the crime. The whole investigation to which the evidence is addressed relates to the fact of crime, none of it to the measure of punishment. Such, at least, is the system of criminal procedure in this state, there being no statute which provides for enlightening the jury for the distinct and separate purpose of aiding them in the exercise of their discretion as to punishment. The doctrine of *Fields v. State*, 47 Ala. 603,

11 Am. Rep. 771, has been widely, and we think justly, criticised. Without the least hesitation we take part with those whose disapprobation of it has been expressed. Many criticisms might be cited, but it is enough to refer to one, 1 Criminal Defenses (Horrigan and Thompson), 693.

2. We have already said there was no error in excluding the offered evidence to show the bad character of the deceased for violence. The material facts touching the homicide are indicated in the second head-note. Under these facts, how could bad character for violence afford any substantial aid to the jury in deciding whether the prisoner acted from malice or from a *bona fide* motive of self-preservation? To ask the question is to answer it.

3. Nor was there anything in the case to fairly raise any question of manslaughter. Although the deceased desired and intended to make a deadly assault upon the accused, he had not actually made any; he was effectually prevented by a third person from so doing for the time being. While the preventive measures were in progress, and before they had failed of their purpose, the accused voluntarily ran up, shot the deceased, and then pursued him into a house and there inflicted the mortal wound by again shooting him, without any apparent necessity or fresh provocation. All the marks or *indicia* of manslaughter seem to be wanting; no question as to that grade of homicide was involved in the evidence.

4, 5. There was no error in ruling out the opinion of a witness as to what the deceased intended to do with the pistol, nor in overruling the motion for a new trial.

Judgment affirmed.

HOMICIDE—EVIDENCE OF BAD CHARACTER OF DECEASED.—In homicide cases, evidence of the bad character of the deceased is admissible only when the plea of self-defense is interposed: *Childers v. State*, 30 Tex. App. 160; 28 Am. St. Rep. 899, and note; *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note; *State v. Turner*, 29 S. O. 34; 13 Am. St. Rep. 706, and note, with the cases collected.

HOMICIDE—THREATS OF DECEASED.—To make threats of the deceased admissible in cases of homicide, in connection with an overt act, the proof must show such a demonstration of an immediate intention to execute the threats as will naturally induce a reasonable belief that the party threatened will lose his life or suffer serious bodily harm if he does not take the life of his adversary: *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note; and see the notes to *State v. Turner*, 13 Am. St. Rep. 711, and *Campbell v. Commonwealth*, 21 Am. St. Rep. 355, where the cases are collected.

HOMICIDE—DUTY OF COURT AS TO INSTRUCTIONS.—It is the duty of the trial court in prosecutions for murder to instruct the jury upon the lower

grades of homicide, if from a legitimate construction of the evidence they might convict of a homicide of a lower grade than murder in the first degree: *Carter v. State*, 30 Tex. App. 551; 28 Am. St. Rep. 499, and note; note to *Campbell v. Commonwealth*, 21 Am. St. Rep. 355, and especially the note to *Oroom v. State*, 21 Am. St. Rep. 187, where the question as to the duty of the court in murder cases to instruct as to manslaughter is discussed.

BLAIR v. STATE.

[90 GEORGIA, 328.]

CONSTITUTIONAL LAW—SUBJECT MATTER OF STATUTE EXPRESSED IN ITS

TITLE.—When the title of an act creating a new city charter and consolidating and declaring the “rights and powers of said corporation, and for other purposes,” affords no indication of any extension of police power beyond the corporate limits, such act is unconstitutional in so far as it provides for extending and exercising police jurisdiction over certain territory adjacent to, but outside the limits of, such city. Under such statute a city police officer has no more power than a private person to make arrests on such territory, and under the code of Georgia he has no power to arrest for the use of abusive language addressed to himself tending to cause a breach of the peace.

CRIMINAL LAW—PRODUCTION OF WITNESSES.—In the trial of a criminal case the prosecution is not bound to call all witnesses present at the difficulty and in court at the time of the trial.

INDICTMENT and conviction of an assault with intent to murder a city policeman by shooting him as he was about to arrest the defendant outside the city limits.

M. H. Blandford, and Cameron and McLester, for the plaintiff in error.

A. A. Carson, solicitor-general, and J. H. Worrill and M. McMichael, for the state.

BLECKLEY, C. J. The constitution declares that “No law or ordinance shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof”: Code, sec. 5067. The question is, whether the latter part of this inhibitory provision has not been violated by the legislature in enacting the third section in the charter of the city of Columbus, approved November 29, 1890. The title of the act constituting the charter reads thus: “An act to create a new charter for the city of Columbus, and to consolidate and declare the rights and powers of said corporation, and for other purposes.” The third section is in these words: “Be it further enacted by the authority

aforesaid, that in addition to the territory embraced in the corporate lines, as set forth in the several acts mentioned in the preceding section, all the land and territory outside of said corporate lines, which lies within the state of Georgia and within one mile and one-half in a straight line from any point of the corporate limits, shall be known as the police district of the city of Columbus, over which the municipal government of the city of Columbus shall have and exercise a limited power and authority only as follows:

“First. The mayor and aldermen of the city of Columbus shall have the sole and exclusive right to regulate the sale of spirituous and malt liquors within said police district, and to grant or refuse a license therefor; and they may put such terms, restrictions and conditions on the sales of such liquor as they may deem proper, but in no case shall a license be granted within said district for a less term than one year, and if any license is granted within said district, the fees thereof shall never be less than the amount of the license fee, within the corporate limits proper of the city of Columbus. All such fees shall be collected in the same manner as similar fees are collected in the city of Columbus and paid into the city treasury.

“Second. All laws and ordinances in force in the city of Columbus in reference to crimes or misdemeanors against the persons of citizens or individuals, against the habitations of persons, relative to property, against the public peace and tranquillity, against public morality and health, and offenses committed by cheats and swindlers, and offenses against public trade, against fraudulent or malicious mischief, shall be in force within the territory comprising the said police district, in the same manner and to the same extent as they are in force within the corporate limits of said city, and for the purpose of preventing the commission of any and all of said offenses and suppressing the same, and in order to apprehend violators of said laws, police jurisdiction is hereby expressly given to the mayor and aldermen of the city of Columbus, over the said entire territory embraced in said police district, and to this end they shall have the power to enforce said laws and ordinances by the marshal and police department of the city of Columbus, just as they may deem proper and necessary to the full protection of the city. It is, however, expressly provided, that no obligation shall rest on the principal [municipal?] authorities to establish any police system within

said district; they are hereby given the power and right so to do, which right they may exercise in full, partially or not at all, as in their judgment the best interest of the city of Columbus may require. For the purposes set out in this section only shall such police district be deemed or held to be a part of the city of Columbus."

The title of the act affords no indication of any purpose on the part of the general assembly to clothe the mayor and aldermen with any power whatever to be exercised over persons or places beyond the corporate limits of the city. The fair and reasonable import of the words, "to create a new charter for the city of Columbus," is that territorially the charter and the city will be coextensive, that the boundaries of the city will limit the range of the charter, and that all parts of the state not embraced within the city limits, as defined by the new charter, or as previously defined by law, would remain unaffected by the legislation about to be enacted; and the fair and reasonable import of the words, "to consolidate and declare the rights and powers of said corporation," is that the rights and powers to be consolidated and declared would be such as are appropriate to be exercised within the city. The power to legislate by ordinance for any place outside of the city is not suggested or intimated by these words, nor does any such suggestion or intimation arise from adding the words, "for other purposes," which, properly construed, would be understood to mean purposes appropriate to the subject-matter of the act (to wit, the creation of a new charter for the city of Columbus) not indicated in the phrase, "to consolidate and declare the rights and powers of said corporation." As each law must be limited to one subject matter, there can be no implication that the phrase "and for other purposes" in the title of an act refers to purposes other than those naturally or ordinarily appropriate to the subject matter expressly declared. If it be legitimate to comprehend within the scope of the act purposes more remote from the subject matter than would usually be expected to be found associated with a subject matter of that class, then these more remote purposes should be clearly indicated in the title of the act. In no other way could the constitutional scheme of confining each law to one subject matter, and the body of the act to the scope of the title, be accomplished. It may be that what has just now been said applies more especially, if not exclusively, to the territorial element in a statute;

but that is the element involved here. Would the title prefixed to this new charter of Columbus put any one on notice, either in the general assembly or out of it, that any territory of the state was to be dealt with except the city? We think not; and any principle of construction or decision which would uphold the grant of power to legislate by ordinance, with no indication of such grant in the title of the act, for territory within a mile and a half of the city limits, would uphold a similar grant of power to legislate for territory extending to any distance, though it might be ten, twenty, thirty or fifty miles from those limits. The constitution intended to protect the people against covert or surprise legislation, and we think the people of Muscogee county residing in the immediate neighborhood of Columbus might well claim surprise at this attempt to subject them to the municipal government of the city without extending the city limits so as to embrace the territory on which they reside. If they had no notice except such as could be derived from the title of the act, they must have been quite unprepared for such an important change in their relations to the municipality.

On the trial of the present case in the court below the policeman alleged to have been assaulted should have been treated simply as a private citizen with reference to his power of making arrests on the territory adjacent to the city. He had no power to arrest for the use of abusive language addressed to himself tending to cause a breach of the peace. Under the code, sec. 4372, no person can be called upon to answer for that species of offense until after indictment or presentment by a grand jury. As the trial proceeded on a wrong theory, it is unnecessary to do more than correct that theory now. The numerous questions and subquestions growing out of it will not arise again.

The contention that the state was obliged to introduce all the witnesses who were present at the difficulty and in court at the time of the trial is not supported by law or the practice which prevails in this state. The solicitor-general is as free to manage the state's case in his own way as is counsel for the accused to conduct the defense according to his own sense of prudence, utility and propriety: *Hill v. Commonwealth*, 88 Va. 633; 29 Am. St. Rep. 744.

Judgment reversed.

CRIMINAL LAW—DUTY OF PROSECUTION TO CALL WITNESSES.—This question is discussed in the note to *Keller v. Commonwealth*, 18 Am. St. Rep. 319.
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The prosecution is not bound to call every witness present at the transaction which is the subject of the indictment: *Hill v. Commonwealth*, 88 Va. 633; 29 Am. St. Rep. 744, and note.

STATUTES—SUBJECT MATTER NOT EXPRESSED IN TITLE.—The title to a statute must clearly express the subject or subjects contained therein, otherwise the statute is unconstitutional and void: *Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 484; 24 Am. St. Rep. 512, and note; note to *Hronek v. People*, 23 Am. St. Rep. 663. The title of an act and the act itself must correspond not literally but substantially: *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135, and note.

WESTERN NATIONAL BANK OF NEW YORK v. MAVERICK NATIONAL BANK.

[90 GEORGIA, 389.]

JUDGMENTS—ASSIGNMENT OF—RIGHTS OF ASSIGNEE.—An assignee of a judgment is not affected by the latent equities of third persons not parties to the judgment of which he had no notice at the time of the assignment.

JUDGMENTS—ASSIGNEE'S RIGHTS AS AGAINST EQUITIES OF THIRD PARTIES.

When a mortgage is given to secure several notes, some of which are negotiated by the mortgagee before maturity and others retained by him, and after the maturity of all the notes he forecloses the mortgage in his own name for the whole amount of the notes so transferred and retained, and then assigns the judgment in foreclosure to his creditor who extinguishes his assignee's antecedent debt, and in addition thereto pays him a large sum in cash as the consideration for such assignment, without notice of the transfer of the notes or that the transferee thereof has any interest in the mortgage or in the foreclosure judgment, such assignee holds the judgment free from, and unaffected by, the equities of such transferee.

J. N. Hammond and Son, and R. A. S. Freeman, for the plaintiff in error.

F. M. Longley and Son, and P. H. Brewster, for the defendant in error.

SIMMONS, J. The Maverick National Bank of Boston recovered against Huguley & Co. and the Western National Bank of New York, upon the following state of facts:

Certain promissory notes of the Alabama and Georgia Manufacturing Company to Huguley & Co., amounting in the aggregate to fifteen thousand dollars, were delivered by the latter to the plaintiff, before maturity, as security for a debt of five thousand dollars and interest. To secure these notes and others not transferred to the plaintiff, the maker of the notes had given to Huguley & Co. a mortgage on certain real estate, but no assignment of this mortgage or of any in-

terest in it was made to the plaintiff. After all the notes had matured, Huguley & Co., in their own name, foreclosed the mortgage for the entire indebtedness which it had been given to secure, having first gotten back the transferred notes, after maturity, from the transferee, under an agreement with the latter to hold them "in trust to be exhibited in court" in the foreclosure proceeding and to return them immediately thereafter. Without the knowledge or consent of the transferee of the notes, Huguley & Co. assigned the judgment of foreclosure to the Western National Bank of New York, the consideration of the assignment being the extinguishment by the assignee of its antecedent debt against them and the payment of a large sum in cash. Afterwards, at a receiver's sale of all the property of the mortgagor, the assignee of the judgment, together with other persons who were joined as defendants in this case, purchased the property, and the amount of the judgment was credited by the receiver as part payment of the purchase money. The plaintiff, in its petition, claimed that it was legally and equitably entitled to follow into the property thus purchased the collateral which it alleged had been fraudulently taken from it, and it prayed for a money decree against the defendants for the amount of the indebtedness to secure which the collateral had been given, or if all the defendants were not parties to the fraud, then against such only as had participated in it. Huguley & Co. filed no defense, but the Western National Bank answered, and in its answer set up that the assignment of the judgment had been taken by it in good faith, without notice of the transfer of the notes in question to the plaintiff, or that the plaintiff had any interest in the mortgage security or in the judgment of foreclosure. On the trial there was evidence tending to establish this defense. The verdict was for the full amount sued for, and the Western National Bank made a motion for a new trial, which was overruled, and it excepted.

The grounds of exception mainly relied upon are based upon the failure of the court below to charge the jury as to the defense of good faith and want of notice on the part of the assignee of the judgment. In this we think the court erred. We think, if the assignee took the judgment in good faith and without notice of the plaintiff's equity, the title was taken free from that equity. It was contended in behalf of the defendant in error that the doctrine *caveat emptor* applies to the purchaser of a judgment, not only as to the equi-

ties of a debtor, but as to all equities which at the time of the transfer exist against the judgment in the hands of the assignor; and in support of this view the following authorities are cited: *Davies v. Austen*, 1 Ves. 247; *Cockell v. Taylor*, 15 Beav. 103; 15 Eng. L. & Eq. 101; *Bush v. Lathrop*, 22 N. Y. 535; *Sheldon v. Edwards*, 35 N. Y. 279; *Schafer v. Reilly*, 50 N. Y. 61; *Clarke v. Hogeman*, 13 W. Va. 718; *Downer v. South Royalton Bank*, 39 Vt. 25; *Cox v. Palmer*, 60 Miss. 793; *Mitchell v. Hockett*, 25 Cal. 538; 85 Am. Dec. 151; 2 Pomeroy's Equity Jurisprudence, sec. 703 et seq. On the other hand, numerous decisions are cited to the effect that the assignee is not affected by the latent equities of third persons, not parties to the judgment, of which he had no notice at the time of the assignment. Mr. Black, in his work on Judgments, states that this is "the generally recognized doctrine": Vol. 2, sec. 956, ed. 1891. To the same effect see 2 Freeman on Judgments, sec. 428, and cases cited, ed. 1892; 12 Am. & Eng. Ency. of Law, 149 (c), and notes. We have found no decision of this court which deals with the exact question here presented. Under our statutes, however, we think the question is free from difficulty. An examination of the cases cited for the defendant in error will show that there is a fundamental difference between all of them and the case before us. Under our statutes the legal title to choses in action is assignable, and judgments "are negotiable by indorsement or written assignment in the same manner as bills of exchange and promissory notes": Code, secs. 2244, 2776, 3577. In those cases the chose in action was non-negotiable, and the legal title was not assigned. Under the common law choses in action, except negotiable securities, could not be assigned so as to carry the legal title; and, in a court of law, any rights in them acquired by other persons than the owner could be enforced only in his name. Hence the rule laid down by Lord Chancellor Thurlow, in *Davies v. Austen*, 1 Ves. 247, that "a purchaser of a chose in action must always abide by the case of the person from whom he buys." As a transfer could convey only an equitable interest, courts of equity, in sustaining as against the transferee the equities of third persons, which prior to the transfer had attached to the chose in action in the hands of the legal owner, were governed by the maxim *prior in tempore potior in jure*. But this rule of priority, while applicable in a contest between merely equitable interests, of course does not apply in favor

of a latent equity as against a purchaser who in good faith has become vested with the legal title. It will be found that the non-negotiable or nonassignable character of the chose in action is the basis of all those decisions which have extended the doctrine *caveat emptor* to the equities of third persons against the assignor. Still, even in the absence of statutes placing the chose in action upon a different footing as to assignability from that occupied at common law, many decisions have followed the view announced by Chancellor Kent, in *Murray v. Lylburn*, 2 Johns. Ch. 442, that the rule which subjects the assignee to the equities which attached to the chose in action in the hands of the assignor is to be understood as meaning the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor. Chancellor Kent, in stating the reasons for this view, says: "The assignee can always go to the debtor, and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and for this reason the claim of the assignee without notice, of a chose in action, was preferred in the late case of *Redfearn v. Ferrier and others*, 1 Dow. Rep. 50, to that of a third person setting up a secret equity against the assignor. Lord Eldon observed in that case that if it were not to be so, no assignments could ever be taken with safety." Whatever may be the force of this reasoning as applied to a merely equitable assignment, there can be no question as to its soundness in the case of a legal assignment, especially where the chose in action is of a negotiable character. The objection of Mr. Pomeroy to the doctrine of *Murray v. Lylburn*, 2 Johns. Ch. 442, is based upon the ground that "it is, in effect, an extension of the peculiar qualities of negotiable instruments to things in action not negotiable": 2 Pomeroy's Equity Jurisprudence, sec. 708, ed. 1892. Our code, it is true, does not render judgments negotiable in the strict sense, so as to place them on the high commercial plane occupied by negotiable paper under the law merchant: (*Heyward v. Finney*, 63 Ga. 854), but they are rendered negotiable in the sense in which, for example, bills of lading and some other documents are called negotiable, and are, of course, placed upon a footing altogether different from that occupied by a non-negotiable chose in ac-

tion. It will be seen, therefore, that the authorities referred to by counsel for the defendant in error do not conflict with our holding in this case.

Looking further to the language of the code we find that section 2244, in which all choses in action are declared to be assignable, although it protects the equities of the debtor, makes no provision as to the equities of third persons. It says: "All choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable." It was contended, however, that section 3597, which relates to the transfer of judgments and executions, should be construed as subjecting the transferee to all equities against the original plaintiff, and not merely to those of parties to the record. The language of that section is as follows: "Any plaintiff or transferee may *bona fide* and for a valuable consideration transfer any judgment or execution to a third person, and in all cases the transferee of any judgment or execution shall have the same rights and be liable to the same equities and subject to the same defenses as the original plaintiff in judgment was." It was argued that the phrase, "subject to the same defenses," covers all matters that could be set up in favor of the defendant, and that the phrase, "liable to the same equities," would therefore be useless unless meant to cover the equities of other persons than the defendant. It should be borne in mind, however, that when this section was incorporated into the code the defendant was not obliged to assert all his defenses against a judgment by way of defense, but could use his equities otherwise than defensively; and the code meant to leave him free to exercise this option still. It is probable that for this purpose, as well as to make explicit the intention that the transferee should take subject to the assertion of equitable as well as legal reasons for nonpayment, both phrases were used. Moreover, this language must be so construed as to harmonize with the general intent of the section to which it belongs, and of other sections cited which relate to the same subject; and it is plain that a construction that would subject the transferee to the secret equities of persons claiming an interest in the judgment, as to whose names and interest the record is silent, would not only be at variance with the principles of equity,

which protect the *bona fide* purchaser of a legal title, but would defeat the object of the law in providing for the assignment of choses in action, and especially in rendering negotiable this class of choses in action. The object was to render more available for commercial purposes a species of property the title to which was formerly incapable of legal transfer; and clearly this purpose would fail if the purchaser were deprived of the protection against secret equities afforded to the *bona fide* purchasers of other kinds of property. To hold the purchaser subject to equities, the existence of which he has no reason to suspect, and which the utmost diligence might not enable him to ascertain, would be altogether inconsistent with the idea of negotiability or even of *quasi* negotiability. If such were the law no purchaser could feel safe in buying this species of property. We are satisfied, therefore, that the equities protected by the section last quoted, irrespective of notice, are those between the parties to the judgment, and not those in favor of strangers. In the present case, as we have seen, the legal title to the judgment was in the assignors, and although as to a part of the claim represented by the judgment they were trustees, their trust character did not appear from the record, and there was nothing in the record to put the purchaser upon notice of any rights of the *cestui que trust*. If, therefore, the purchase was made in good faith, and without notice, the assignee was protected against the secret equity of the *cestui que trust*. The court below having failed to charge the jury in accordance with this view of the law, the plaintiff in error is entitled to a new trial.

Judgment reversed.

ASSIGNMENT OF JUDGMENTS—RIGHTS OF ASSIGNEE.—This question is discussed in the notes to the following cases: *Dugas v. Mathews*, 54 Am. Dec. 368; *Isett v. Lucas*, 85 Am. Dec. 576; *Robeson v. Roberts*, 83 Am. Dec. 315; *Graves v. Woodbury*, 40 Am. Dec. 298. The assignees of judgments take them affected with all the equities and defenses which might have been asserted against them in the hands of the assignor: *Winslow v. Leland*, 128 Ill. 304; *Sutton v. Sutton*, 26 S. C. 33. As against the plaintiff assigning a judgment held by him, his act is binding as well against himself as one taking a second transfer knowing the facts: *Ford v. Rosenthal*, 74 Tex. 28. The rule of *caveat emptor* applies in the purchase of a judgment, so far as third persons are concerned, in the same manner as it does to the purchase of any other personal property: *Mitchell v. Hockett*, 25 Cal. 538; 85 Am. Dec. 151, and note.

LASCELLES v. STATE.

[90 GEORGIA, 847.]

EXTRADITION.—A fugitive from justice who has been returned by one state to another under extradition proceedings is subject to trial and conviction in the latter state for a crime committed there before his return, and not mentioned in such proceedings, without first allowing him a reasonable opportunity to return to the state from which he has been surrendered; and it is immaterial that the offense complained of is not a crime in the state from which he is returned.

CRIMINAL LAW—PRACTICE—NOLLE PROSEQUI.—Under a statute allowing a *nolle prosequi* to be entered by the attorney-general, in any criminal case, with the consent of the court, after an examination of the case, such consent is conclusive upon the validity of a *nolle prosequi* which the court has allowed the attorney-general to enter before putting the accused on trial. The latter, when arraigned upon an indictment subsequently found and returned by the grand jury for the same crime, cannot, by plea in abatement or motion to quash, draw in question the rightful disposition of the former indictment by *nolle prosequi*.

GRAND JUROR, DISQUALIFICATION OF—INDICTMENT.—PLEA IN ABATEMENT OR MOTION TO QUASH an indictment upon the ground that a member of the grand jury that found the indictment was related by affinity to the prosecutor within the fourth degree, is not sustainable, at least when the accused has had an opportunity to make the question by challenge before the finding of the indictment.

GRAND JURORS—OBJECTIONS TO QUALIFICATIONS OF, HOW TAKEN.—The only objections which can be taken to grand jurors by plea in abatement to the indictment must be such as would disqualify the juror to serve in any case, and all other objections affecting the competency of the juror must be taken by challenge before the indictment is found, and will not be heard after the time for challenging is past.

INDICTMENT FOR FORGERY—JOINDER OF AND ELECTION BETWEEN COUNTS.—Several counts, each charging forgery, one by fraudulently and falsely making a bill of exchange in a fictitious name, another by fraudulently obtaining money by use of the same bill drawn in a fictitious name, another for fraudulently obtaining money by color of the same bill, and another for fraudulently and falsely uttering the same bill, the last two counts not alleging the bill to be drawn in a fictitious name, may be joined in the same indictment, and on the trial the prosecution is not bound to elect on which particular count or counts it will rely for a conviction.

PRACTICE—CONTINUANCE OF CRIMINAL CASE—DISCRETION OF COURT—EVIDENCE.—A denial by a trial court of an application for a continuance for the term in a criminal case will not be disturbed on appeal unless an abuse of discretion is clearly shown, and on the showing for a continuance no error is committed by admitting evidence of facts constituting a counter-showing, and consisting of acts and declarations by the accused inconsistent with the good faith of his showing, or in admitting the declarations of others not separately objected to as hearsay.

FORGERY—EVIDENCE—REPRESENTATIONS.—Statements by one accused of forgery calculated to create an impression that he is a person of respectability and wealth, made to persons defrauded by the forgery, and a

to another who was the medium of introduction between them, are admissible in evidence as tending to show guilt when accompanied with facts and circumstances indicating such representations to be false; and the fact that the accused pretended to write to his father for a large sum of money, and mailed an envelope to such person, which, being returned unopened in due course of mail, was found to contain nothing but a blank piece of paper, is also admissible in evidence, together with such envelope and its contents.

FORGERY—ASSUMPTION OF FICTITIOUS NAME AND RELATIONSHIP.—When one fictitiously assumes the name of another, together with the relationship of son to that other, and in that name draws and passes a bill of exchange for value to one who relies upon such assumptions, the drawer of the bill is guilty of forgery.

FORGERY—ASSUMPTION OF FICTITIOUS NAME AND CHARACTER.—Although one has been accustomed to use a certain assumed name, yet when he gives such name a fictitious character, which is calculated and intended to deceive, by imparting an apparent value to a bill of exchange signed by him in such name, which might not otherwise attach to it in the minds of the person with whom he is dealing, and he thus obtains money from such person, he is guilty of forgery.

INDICTMENT for forgery. On the trial defendant moved for a continuance on a showing made by affidavits to the effect that he was extradited under the name of Walter S. Beresford to answer only to two indictments for larceny, and for cheating and swindling; that the indictment against Sidney Lascelles for forgery was not included under his delivery to the law officers of Georgia, nor was it at that time pending against him, but was found since his incarceration in that state; that not having had any previous notice that such indictment would be found, he had had no sufficient opportunity or time to prepare for his defense; that in order to make provision for his defense he has endeavored to get bail, and has every reason to believe that it would have been obtained but for the fact that the prosecution has by importunities, threats, and menaces prevented one Vandiver from going on his bond, though abundantly able so to do; that defendant never expected that such indictment would be found against him until informed that it had been found by his counsel; that he is a British subject, a resident of London, and has been in the United States but a short time; that he has secured counsel only within a few days last past, and that various persons, naming them, in New York and London know his true name to be Walter S. Beresford, and have never known him by any other name, and that he confidently expects the attendance of such witnesses, together with others, at the next term of court, and to be able at that time to prove

to the satisfaction of the court that his name is Walter S. Beresford; that his leaving New York by virtue of the extradition papers was so sudden as to afford him no time in which to arrange his financial affairs for the purposes of his defense, in the employment of counsel and otherwise; that he makes this showing for a continuance only for the *bona fide* purpose of preparing his defense. The defendant's counsel, Mr. Dean, stated to the court, on behalf of himself and other counsel employed by the defense, that they had been retained in the case only within a few days of the time of trial, and had not had time sufficient to prepare the defense, so as to enable the defendant to go to trial safely. To resist this motion for a continuance, the prosecution introduced the hotel register of the Central hotel at Rome, Georgia, showing that the defendant registered his wife's name as Mrs. Sidney Lascelles; also the testimony of one Moore, that defendant stated that he had signed his right name to such register; also defendant's affidavit for a marriage license, in which he swore that his name was Sidney Lascelles; also the testimony of D. B. Hamilton, that the defendant had stated to him that the name of Walter S. Beresford was assumed and fictitious, and that his true name was Sidney Lascelles, and that he had so registered his wife by his proper name; also the testimony of the same witness that one McGuire and one Pendleton, who had dealt with the defendant, denounced him as a great fraud; also the testimony of Harper Hamilton, that said McGuire and Pendleton had so denounced the defendant, and that the latter had introduced his wife to witness as Mrs. Lascelles, and that in conversation she had called him Sidney. This evidence was objected to by the defendant, and admitted over such objection. The remaining facts appear from the opinion and from the head-notes above.

W. W. Vandiver, Ewing and Crosby, Dean and Smith, S. and M. Wright, C. Rowell, and J. W. Fain, for the plaintiff in error.

W. J. Nunnally, solicitor-general, J. Branham, W. S. McHenry, and W. J. Neel, for the state.

LUMPKIN, J. 1. The plaintiff in error was convicted of forgery. He had been indicted under the name of Walter S. Beresford, as a common cheat and swindler and for larceny after trust, and, upon the indictments for these offenses, requisitions were issued upon the governor of New York, and

the accused was arrested in that state in compliance with the requisitions, and delivered to the officer appointed in behalf of this state to receive him, who brought him here and delivered him to the sheriff of the county where the indictments had been found. While in jail, where he had been kept continuously from the time he was placed there under the charges made in these indictments, an indictment for forgery was found against him, based upon the same transaction as the charge of cheating and swindling, and he was thereupon convicted. By his motion to quash the indictment and by his plea in abatement, he made the objection that it was unlawful to try him for an offense not charged in the extradition proceedings, without first allowing him an opportunity to return to the state from which he had been surrendered.

We think this objection was properly overruled. No such limitation upon the right of trial as that contended for is to be found in the constitution and laws of the United States or of this state. That such a limitation exists in cases of extradition from foreign countries, has been determined by the supreme court of the United States in the case of *United States v. Rauscher*, 119 U. S. 407; and it was contended that the doctrine of that case is applicable to this. In our opinion, the reasons which control in cases of foreign extradition do not apply where the fugitive is surrendered under the provisions of the federal constitution by the authorities of one state of the Union to those of another. In the first place, the limitation which exists in cases of foreign extradition is matter of express law. By the act of Congress of March 3, 1869, chapter 141, section 1, as construed in the *Rauscher* case, it is provided that the accused shall be tried only for the crime specified in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States before he can be arrested or detained for another offense. It is significant that Congress, while thus careful to secure to the fugitive the right of return in cases of extradition from a foreign country, has made no such provision with reference to persons surrendered from one state of the Union to another. Moreover, the mutual rights and obligations of foreign governments with respect to extradition are defined usually by treaties, in which the agreement to surrender extends, not as in the case of the states, under the federal constitution, to every offense against the laws of the demanding state, but only to certain offenses specified in the treaty; and this, ac-

according to the views announced in the *Rauscher* case, is equivalent to the exclusion of the right to try for other offenses, or for an offense other than that for which the fugitive was surrendered. In that case the crime for which the accused was tried was not only a different one from that for which he was surrendered, but was not one of those specified in the treaty. The treaty being, under our constitution, a part of the law of the land, it was held to be the duty of the courts to take cognizance of it and enforce it as such, although in the particular case the foreign government had not asserted its rights in the premises. When we go back of the express law on the subject, and consider the matter independently of the statute referred to or of the obligations assumed by treaty, it will be found that the right of the person extradited to return to the country from which he was surrendered, is based upon the right of that country to afford asylum to the fugitive, and to refuse to give him over to another except upon such terms as it may see fit to impose. It is well settled that the criminal himself never acquires a personal right of asylum or refuge anywhere. Such right as he may have in this respect grows entirely out of the rights of the government to whose territory he has fled. It matters not, so far as the right to try him is concerned, that he may have been abducted while in another state, and brought back illegally and against his will to the state whose criminal laws he has violated, nor, in such case, that the executive of the state from which he was taken has demanded his return: *Mahon v. Justice*, 127 U. S. 700. See also *Ker v. Illinois*, 119 U. S. 436, decided on the same day as *United States v. Rauscher*, 119 U. S. 407. That the right to protect the fugitive who has taken refuge in its territory exists on the part of every independent nation, except in so far as it may have agreed to forego the right, is recognized by the supreme court of the United States in the *Rauscher* case, as an established principle of international law. But to our minds it is clear that under the organic law of the Union, no such right exists on the part of the several states with reference to each other. The constitution declares that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime": Art. 4, sec. 2, subsec. 2. And it is settled that this

provision extends without exception to all offenses punishable by the laws of the state where the act was done. It is immaterial that the thing complained of is not a crime in the state in which the accused is found; nor can the authorities of that state inquire into the question of his guilt or innocence. The sole question is, whether he is a fugitive charged with crime under the laws of the demanding state. If he is, the duty to deliver him up is imperative. The framers of the organic law clearly intended that there should be no reserved right to convert any state into a place of refuge for fugitives from the justice of another, and that state lines should constitute no insuperable obstacle to the enforcement of the criminal laws of any part of the Union, as to offenses committed within the field of their operation. By the act of 1793 Congress has constituted the executive authority of the state to which the accused has fled the agency for carrying into effect the provisions of the federal constitution and laws as to arrest and delivery. His sole function is to ascertain whether the authorities of the demanding state have on their part complied with the constitutional and statutory requirements, and if so, to cause the arrest and delivery of the fugitive. If these requirements are complied with, he has no further interest in the matter and cannot set up any right of his state to protect the fugitive. The sole right which his state can set up as against the right of the demanding state is, that its own justice shall be satisfied if at the time of the demand the accused stands charged with a violation of its laws. In such cases the right of the demanding state is not denied, but is merely suspended until a prior claim shall have been discharged. The imperative duty of delivery, where the federal requirements are complied with, is recognized in the legislation of this state (code, secs. 54, 55), the only reservation of any right of the state being that which has just been indicated. In *Johnston v. Riley*, 13 Ga. 98, this court held that "when a demand is made by the executive officer of one state for a fugitive from justice who has taken refuge in another state, under the provisions of the constitution and laws of the United States, and a copy of the indictment found or the affidavit made, as provided by the act of 1793, shall be produced and duly authenticated, as required by the act, charging the person so demanding with having committed a crime against the laws of the state from which he fled, the executive officer of the state upon whom the demand is made for the surrender

of such fugitive must be governed by the record produced; he has no authority to make any addition to it, or to look behind the indictment or affidavit, and inquire whether, by the laws of his own state, the facts charged therein would constitute a criminal offense; but it is made his imperative duty, under the supreme law of the land, which he has sworn to support, to surrender up such fugitive to the authorities of the state whose laws have been violated, having jurisdiction of the crime." On this subject see also 2 Moore on Extradition, secs. 607, 608 et seq.; Spear on Extradition (edition of 1885), 422-434; Hawley on Interstate Extradition, 10 et seq. 48; *Kentucky v. Dennison*, 24 How. 99. It may be true that there is no power on the part of the federal government or of the demanding state to compel performance of this duty, but it is not on that account in any less degree a duty.

If, therefore, the demand cannot, as a matter of right, be refused when made in compliance with the federal requirements, it would be idle for the authorities of the state to whom the accused was surrendered to set him at large so that another demand might be made, before trying him for an offense other than that charged in the requisition upon which he was surrendered. Certainly they are under no obligation, before trying him for other violations of law, to place the executive of the surrendering state in a position to do or refuse to do that which, under the supreme law of the land, it is his imperative duty to do. If what we have said is true, considerations of comity and good faith on the part of the state to which the surrender was made are not involved in the matter. Besides, if it is competent for the state in which the surrender is made to impose any conditions not imposed by the federal laws, no such condition appears in this case. There was no executive pledge on the part of this state, and no stipulation on the part of the state of New York, so far as the record discloses, which could give rise to an implication of bad faith; and the courts of that state have declined to recognize any such limitation upon the right of trial as that contended for in behalf of the accused in this case: See *People v. Cross*, decided by the supreme court, June 1, 1892 (19 N. Y. Supp. 271); affirmed by the court of appeals, 135 N. Y. 536; 31 Am. St. Rep. 850.

We think no further discussion is required to show that the reasons for this limitation in the case of foreign and independent nations, do not control as between states united under a

common supreme government, the objects of whose union, among others, are "to establish justice, insure domestic tranquillity," and "promote the general welfare": See preamble to constitution. As between states occupying these relations to each other, the right of one to protect fugitives from the justice of another, or to place any check or limitation upon the right of trial by another, would be wholly inconsistent with the objects of the union, and besides could be of no value, while to each of the states, as well as to the whole union, it is of the highest importance that each shall have the right to punish all offenders against its laws, no matter to what part of the common territory they may have fled.

The conclusion reached in this case, although not in accord with the views announced by some courts, is sustained by a decided preponderance of authority. The cases cited *contra* which are nearest in point are those of *State v. Hall*, 40 Kan. 338; 10 Am. St. Rep. 200; and *Ex parte McKnight*, 48 Ohio St. 588. In the case of *In re Cannon*, 47 Mich. 481, also cited *contra*, the question arose upon an inquiry as to the legality of an arrest in a bastardy suit, after the defendant had been brought back to the state upon another charge; and according to the view of the court the bastardy proceedings were not criminal in the strict sense of the term, and involved no offense for which extradition could have been demanded. The main ground upon which these decisions rest is, that it would be bad faith and a perversion of justice, after procuring the surrender of a person upon one charge, to try him upon another. Such is the view expressed by Mr. Spear in his work on Extradition, 525 et seq., and by Judge Cooley in the Princeton Review, Jan. 1879, quoted from at some length in *State v. Hall*, 40 Kan. 338; 10 Am. St. Rep. 200. This view seems to have been influenced to some extent by the decisions as to the illegality of arrest in civil actions of parties brought within the jurisdiction on a criminal charge, as well as by the supposed analogy, which we have already discussed, to cases of international extradition. We think there are various reasons why cases involving the fraudulent use of criminal process by private individuals to promote the ends of a civil action stand upon an altogether different footing from cases where a state which has brought a person within its jurisdiction upon one charge proceeds afterwards to try him for other offenses against public justice. A controlling distinction to be noted is, that a person against

whom it is sought merely to establish or enforce a civil liability has personal rights which are violated by his being brought into the jurisdiction by fraud, while, as we have seen, an offender against the criminal laws of the state acquires no right by his flight or absence from the jurisdiction, which the courts, in the administration of those laws, are bound to regard when he is again found within the jurisdiction. This was the doctrine of the common-law courts, and may now be regarded as settled in this country by the decisions of the supreme court of the United States in the cases of *Ker v. Illinois*, 119 U. S. 436, and *Mahon v. Justice*, 127 U. S. 700. The manner in which the accused was brought into the jurisdiction is not taken into account unless some right of the government which has surrendered him has been violated, or would be, by his trial; and such rights, if not asserted by the government itself, the courts are not bound to enforce at the instance of the accused, unless by express law it is made obligatory upon them to do so. And clearly, if that government would have no right to object to his surrender for the offense for which he is put on trial, or has not asserted any such right, and in delivering him up imposed no condition as to his trial for other offenses, the question of good or bad faith, as we have already said, is not involved. Before the state should forego its right to try or punish for violations of its laws when the offender is found within its jurisdiction we think there should be some very plain and positive duty in the premises. But whatever may be thought of the considerations which should influence the executive department of the state the courts must administer the law as they find it, without regard to any supposed rights of other states not defined by law, and not asserted before them by the proper authority. These views are supported by the following authorities: 2 Moore on Extradition, ed. 1891, secs. 516 et seq., 642-644; Rorer's Interstate Law, 227; Hawley's Interstate Extradition, 79 et seq., 46 (1890); 1 Bishop's Criminal Procedure, sec. 224 b; *People v. Cross*, 19 N. Y. Sup. Ct. 271; 135 N. Y. 536; 81 Am. St. Rep. 850; *Williams v. Weber*, 28 Pac. Rep. 21 (Col. App., Nov. 9, 1891); *Ham v. State*, 4 Tex. App. 645; *State v. Stewart*, 60 Wis. 587; 50 Am. Rep. 388; *In re Noyes* (U. S. Dist. Ct. of N. J.), 17 Alb. L. J. 407.

It may also be worthy of note that the policy of the political department of this state has been to treat interstate ren-

dition not as a matter of comity or discretion, but as an absolute duty when the federal laws on this subject are complied with on the part of the demanding state: See correspondence between Governor Gordon of this state and Governor Taylor of Tennessee (1889), 82 Ga. Rep., Appendix, 810; also correspondence between Governors Schley and Gilmer of this state and the executive of Maine (1837-1839), referred to in 2 Moore on Extradition, sec. 563. Governor Gordon, in contending that the right to the rendition of the fugitive extended to misdemeanors of every kind, as well as to all other offenses punishable by the laws of the demanding state, whether punishable or not at common law or by the statutes of other states, says: "Interstate extradition is not a matter of comity, but of cold, hard law." "The governor of a state . . . has no legal right of discretion to refuse to issue his warrant when a requisition is made upon him, if that requisition is made in conformity with the law of Congress." Governor Gilmer, in one of the communications referred to, says: "Unless the governments of the several states shall deliver up, upon demand, all within their jurisdiction who are charged with the commission of crimes in other states with the same certainty that criminals are arrested by the officers of justice within the jurisdiction where their offenses are committed the people of this country have no sufficient security for the protection of their rights against the facility with which offenders can escape from the jurisdiction where alone they can be tried, and our form of government will have failed in providing for the performance of one of its most important functions—the certain punishment of crimes." "The arrest of fugitives from justice can never be asked of a governor as a matter of favor, to be granted according to his discretion. . . . The demand must be made as a matter of right; and if accompanied by the proof required by the law of the United States the duty is imperative," the proof here referred to being the authenticated copy of the affidavit or indictment in which the charge is preferred: 2 Moore, 892, citing 4 Sen. Docs., 26 Cong., 1st Sess. 273.

2. It appears from the record that a prior indictment for forgery was found against the accused on the thirtieth of September, 1891, and that, on the fifth of October, the court passed an order reciting that "the solicitor-general desiring that a *nolle prosequi* be entered on this bill for the purpose of drawing another of fuller counts, it is therefore ordered that this

bill of indictment be and the same is hereby *nol. pros'd.*" On the same day another true bill for forgery was found against the defendant upon the same facts as were set forth in the former bill; and on the next day this second bill, on motion of the solicitor-general, was ordered quashed, the order reciting that it appeared to the court to be defective upon its face. Subsequently, on the same day, an order was passed on the same bill, that a new bill of indictment be presented and laid before the grand jury; whereupon, on the same day, was found the indictment upon which the defendant was tried and convicted. The accused, by motion to quash and plea in abatement, objected that the entering of a *nolle prosequi* as to the indictment of September 30th was illegal, because the same was not done on account of any fatal defect therein; that there was no order directing a new bill found on the 5th of October, and therefore the bill found on that day was null and void; and that the order disposing of the bill found on that day, and the order of October 6th, directing the finding of a new bill, were improperly granted. Under the act of February 26, 1877, entitled, "An act to allow a *nolle prosequi* to be entered in criminal cases with the consent of the court," and which declares "that a *nolle prosequi* may be entered by the solicitor-general in any criminal case, with the consent of the court, after an examination of the case in open court": Acts 1877, p. 108; code, sec. 4649, the consent of the court is conclusive upon the validity of a *nolle prosequi* which the court has allowed the solicitor-general to enter before putting the accused on trial. The latter, when arraigned upon a bill of indictment subsequently found and returned by the grand jury for the same act or offense, cannot, by plea in abatement or motion to quash, draw in question the rightful disposition of the former bill by *nol. pros.*

3. Another objection raised by motion to quash and plea in abatement was, that a member of the grand jury that found the bill was related by affinity to the prosecutor within the fourth degree, his wife being a second cousin to the prosecutor. According to the principle ruled in former decisions of this court, a plea in abatement or motion to quash, based upon objections of this character, is not sustainable, at least if the accused has had an opportunity to make the question by challenge before the finding of the indictment: *Betts v. State*, 66 Ga. 508; *Williams v. State*, 69 Ga. 12; *Lee v. State*, 69 Ga. 705; *Turner v. State*, 78 Ga. 174. In this case the accused

was apprised by the warrant for his arrest, several days before the indictment was found, that the case would go before the grand jury, and it is not shown in his plea or motion to quash that he had no opportunity to make the objection by challenge. The case of *Reich v. State*, 53 Ga. 73, 21 Am. Rep. 265, is distinguishable from this case and the others cited. There the grand juror was an alien, and was therefore incompetent to serve in any case. Not being a citizen, he lacked one of the necessary qualifications prescribed by law. Here the grand juror, so far as appeared, had all the legal qualifications to act generally in that capacity, but was subject to objection merely because of implied bias in the particular case. Moreover, in *Reich v. State*, 53 Ga. 73, 21 Am. Rep. 265, the charge was preferred by special presentment; so there was no reason to suppose that the accused could have anticipated the action of the grand jury. The distinction between grounds of challenge *propter affectum*, or for favor, and grounds *propter defectum*, which go to the lack of capacity to serve in any case, and which would render the accusation void if successfully maintained, is noted in the case of *Betts v. State*, 66 Ga. 508. It was there held that "it was not a good plea in abatement to an indictment, that one of the grand jurors who found it had previously been a member of the coroner's jury who sat upon the corpse and who found that the deceased had come to his death at the hands of the present defendant, and that the killing was murder." In *Williams v. State*, 69 Ga. 12 (5 c), it was held that "if a defendant in a criminal case can except to a grand juror at all, on the ground that he has formed and expressed an opinion, it should be done before the true bill is found, and not on the trial thereunder. Certainly so where the defendant had notice of the pending consideration of his case by the grand jury, by reason of having been previously placed under bond." "The truth is," said Jackson, C. J., in the opinion in that case, "it is a matter of comparatively little importance that grand jurors should not have formed opinions, because they only put the party on trial, and that after hearing only one side of the case. If, however, it is deemed important in a particular case to fight the prosecution *in limine*, diligence requires that the challenge be made before the bill is found. In this case the party could have done so." In *Lee v. State*, 69 Ga. 705, it was held, as in the case of *Betts v. State*, 66 Ga. 508, that service by one of the grand jury upon the coroner's inquest that found the defend-

ant had committed the homicide under consideration, was not a good ground for a plea in abatement. The court said that a traverse juror stands upon a different plane from a grand juror, in respect to causes of challenge. "The latter, where there is a homicide proved, only puts the presumption of the law into the form of an accusation against the slayer; the former tries his case, and must be without bias or prejudice," etc. In *Turner v. State*, 78 Ga. 174, it was held that "points relating to the number of grand jurors and their competency should be made before the true bill is found, and not on the trial before the traverse jury, especially where the defendant is under a charge that apprises him that the case will go before the grand jury, by being under bond to appear or confined in jail to answer the offense in court." See also *Roby v. State*, 74 Ga. 812. The cause of disqualification alleged in the present case belongs to the same class of causes of challenge as does the fact of service by a grand juror on a previous investigation of the same subject-matter in controversy: 5 Bac. Abr. 353 et seq. In Thompson and Merriam on Juries, sec. 535, it is said: "The only objections which can be taken to grand jurors by plea in abatement must be such as would disqualify the juror to serve in any case. In other words, the plea must show the absence of positive qualifications demanded by law. All other objections affecting the incompetency of the juror must be taken by challenge, if at all, and will not be heard after the time for challenging is past. Thus, it is not a good plea to an indictment for murder, that a member of the grand jury which found the indictment was a nephew of the person who was murdered": See *State v. Easter*, 30 Ohio St. 542, 27 Am. Rep. 478, which was a case of this kind; also the recent case of *State v. Sharp*, 110 N. C. 604, in which the son of the prosecutor was a member of the grand jury and actively participated in the finding of the bill. Also *State v. Rickey*, 10 N. J. L. 83; *State v. Hamlin*, 47 Conn. 95; 36 Am. Rep. 54; *United States v. White*, 5 Cranch C. C. 457; *United States v. Williams*, 1 Dill. 485 (opinion by Dillon, J.). Some of these decisions were rendered in states where there were no statutory provisions as to the challenging of grand jurors, and where it did not appear that it had been the practice to exercise this right, but the right was recognized as existing wherever the common law prevailed. See Wharton's Criminal Pleading and Practice, 9th ed., secs. 344, 350, par. 4; 1 Bishop's Criminal Procedure, 3d ed., secs. 876, 878.

4. The exceptions to the overruling of the demurrer as to misjoinder of counts, and to the overruling of the motion to require the state to elect upon which of the counts it would rely, are dealt with in the fourth head-note. As to these exceptions see: *Hoskins v. State*, 11 Ga. 94; *Stewart v. State*, 58 Ga. 580; *Thomas v. State*, 59 Ga. 786; *Johnson v. State*, 61 Ga. 213; *Gilbert v. State*, 65 Ga. 450; Hopkins' Penal Code, secs. 1514, 1515.

5. It is assigned as error that the court refused to continue the case for the term, and allowed the accused only twenty days to prepare for trial. The showing for continuance and the counter-showing are set out in substance in the reporter's statement. On the counter-showing, taken in connection with the showing, there was no abuse of discretion by the presiding judge in denying the application. And no error appears in admitting in evidence the facts constituting the counter-showing, most of them consisting of acts and declarations by the prisoner himself which were inconsistent with the good faith of his showing, and those which consisted of declarations by others not being separately objected to on the ground that they were hearsay.

6. The testimony ruled upon in the seventh head-note tended to illustrate the motives of the accused in the transaction in question, and was clearly admissible.

7. Several grounds of the motion for a new trial are based upon the failure and refusal of the court to charge, in effect, that if the name signed by the accused, although not his own, was one which he had been accustomed to employ and under which he had done business, the jury could not convict him. It was insisted that in order to constitute forgery the name must have been assumed for the sole purpose of defrauding the persons alleged to have been defrauded. We think it immaterial for what purpose the name was originally assumed and used if it is shown that in the instance in question it was used to defraud. It was a fictitious name within the meaning of the statute (code, sec. 4453) if the accused gave it a fictitious character which was calculated and intended to deceive by imparting an apparent value to the writing which might not otherwise attach to it in the minds of the persons with whom the accused was dealing. Where one has been accustomed to use a certain assumed name, it is not to be implied merely from his signing such name to a bill of exchange or other writing that the purpose is to defraud; it is

not forgery unless there is something else besides the mere signing to show that the fictitious character of the name is in that instance an instrument of fraud. In the case of *In re Dunn*, 1 Leach Cl. Cas. 57, and *Reg v. Martin*, 49 L. R. C. C. 244, cited for the plaintiff in error, there was no such showing made. In the present case, however, the accused, at the time of signing the writing, gave a fictitious character to the name, upon the faith of which he induced the parties with whom he was dealing to give value for the writing. According to his representations to them it was the name of the son of Lord Beresford, an English nobleman of great wealth, who was about to deposit in bank twenty-five thousand dollars in the name of this son. When Mr. Hamilton hesitated about paying the money the accused said: "Our name can command any amount of money in England." He not only used an assumed name, but, in connection with the signing of the writing in question, gave a fictitious character to the name, and impersonated that character in order to obtain money upon the writing, which he might not have gotten if he had simply represented himself to be Walter S. Beresford, or had stopped with the representations he had made as to his own wealth, without making these additional representations as to his relationship and standing. The parties with whom he was dealing paid over their money to the supposed son of Lord Beresford upon the faith of a writing executed by the accused in that character, when, as it afterwards turned out, the name used was not his own name, and Lord Beresford had no son of the name used. There being no such son it was not a case of personating another, as contemplated by section 4596 of the code. It was the personating of a fictitious person, and this is of the essence of the offense described in the section upon which the first count of this indictment was based: Code, sec. 4453.

8, 9. The court did not err in its instructions as to what constituted a counterfeit letter or writing under section 4455 of the code. The evidence warranted the verdict, and there was no error in not granting a new trial on any one of the grounds contained in the motion therefor.

Judgment affirmed.

CONTINUANCE—DISCRETION OF COURT.—A motion to postpone a trial to a later day is addressed to the discretion of the court, and its ruling thereon will not be disturbed in the absence of an abuse of this discretion: *Garner*

v. *State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note; also *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65, where it was held that the discretion of the trial court in granting or refusing a continuance is unreviewable.

EXTRADITION—DETENTION FOR ANOTHER CRIME.—Where one state procures the extradition from another state of an alleged fugitive from justice, to be prosecuted for some particular offense for which his extradition was obtained, he cannot be prosecuted in such state for another and different offense until he has had a reasonable time in which to return to the place from which he was extradited: *State v. Hall*, 40 Kan. 338; 10 Am. St. Rep. 200, and extended note: *Ex parte McKnight*, 48 Ohio St. 588; extended note to *Matter of Fetter*, 57 Am. Dec. 400. In *People v. Cross*, 135 N. Y. 536, 31 Am. St. Rep. 850, and *Commonwealth v. Wright*, 158 Mass. 149, 35 Am. St. Rep. 475, it was held that a fugitive from justice, surrendered to the authorities of this state, upon their demand, by the governor of another state, may be held and tried here for a crime other than that charged in the warrant by which he was arrested and surrendered in the state to which he had fled when the criminal act for which he was extradited and that for which he is indicted and held is the same.

GRAND JURY—QUALIFICATIONS—OBJECTIONS TO, HOW TAKEN.—This question is thoroughly discussed in the monographic note to *Commonwealth v. Green*, 12 Am. St. Rep. 900.

CRIMINAL LAW—NOLLE PROSEQUI A BAR: See extended note to *State v. Champeau*, 36 Am. Rep. 755. A *nolle prosequi* does not amount to an acquittal or a pardon, but is simply a discharge of a particular indictment upon which it is entered, and is no bar to a future indictment for the same offense: *State v. Hornsby*, 8 Rob. (La.) 583; 41 Am. Dec. 314, and note; *Contra: Mount v. State*, 14 Ohio St. 295; 45 Am. Dec. 542. See also *State v. Smith*, 49 N. H. 155; 6 Am. Rep. 480.

INDICTMENT—JOINDER—ELECTION BETWEEN COUNTS.—Several distinct felonies may be charged in the same indictment when all relate to the same transaction and admit of the same legal judgment, and as a rule the prosecution will not be required to elect on which count it will proceed in such a case: *State v. Howz*, 109 Mo. 654; 32 Am. St. Rep. 686, and note with cases collected.

FORGERY—SIGNING FICTITIOUS NAME.—Signing the name of a fictitious person with the intent to defraud is a forgery: *State v. Warren*, 109 Mo. 430; 32 Am. St. Rep. 681, and note; *State v. Wheeler*, 20 Or. 192; 23 Am. St. Rep. 119, and note.

INMAN v. ELBERTON AIR LINE RAILROAD COMPANY.

[90 GEORGIA, 668.]

RAILROADS—FIRE CAUSED BY SPARKS—BURDEN OF PROOF.—In an action to recover for the loss of property by fire alleged to have been caused by sparks escaping from one of two locomotives belonging to a railroad company, the burden of proof is upon the plaintiff to show by a preponderance of proof that the fire was communicated by one of the locomotives as alleged, and proof of a mere possibility that it came from such source is not sufficient.

RAILROADS—LIABILITY FOR FIRE CAUSED BY SPARKS.—When, in an action to recover for the loss of property by fire alleged to have been caused by the escape of sparks from one of two railroad locomotives, it is shown that the fire was communicated from one of them, still the company is not liable if it exercised all reasonable care and diligence in keeping such locomotives in proper condition, as well as in properly managing and operating them at the time and place in question.

RAILROADS—FIRE CAUSED BY SPARKS—EVIDENCE OF NEGLIGENCE.—In an action to recover for loss by fire alleged to have been caused by the escape of sparks from one of two particular railroad locomotives, evidence that other locomotives belonging to the same company had at other times emitted sparks at or near the place of the fire in question is not admissible to show negligence on the part of the company.

RAILROADS—FIRE CAUSED BY SPARKS—EVIDENCE OF NEGLIGENCE.—When, in an action to recover for loss by fire caused by the escape of sparks from a railroad locomotive, the locomotive which caused the fire cannot be fully identified, evidence that the company's locomotives frequently emitted sparks on former occasions near the time of the fire in question is generally relevant and competent to show habitual negligence on the part of the company, but when the locomotive alleged to have caused the fire is identified, evidence as to the condition of other locomotives and of their causing fires is clearly irrelevant and inadmissible.

RAILROADS—FIRE CAUSED BY SPARKS—ERRONEOUS INSTRUCTIONS NOT REQUIRING REVERSAL OF JUDGMENT.—When the controlling issue in a case is whether or not the fire complained of originated from sparks emitted by a particular railroad locomotive, and the evidence shows clearly that it did not so originate, and consequently that the defendant is not liable, instructions based upon the hypothesis of negligence on the part of the plaintiff as causing the loss, though not authorized by the evidence, will not require a reversal of the judgment when the verdict is manifestly right.

R. J. Jordan and W. L. Hodges, for the plaintiffs in error.

E. Womack and A. G. McCurry, for the defendant in error.

SIMMONS, J. 1. The action was against the railroad company for the value of certain cotton alleged to have been burned upon a platform a few feet from the defendant's track, by sparks which escaped from one of two locomotives described in the declaration, on account of the defective condition of the engine and the negligent manner in which it

was operated. The verdict was in favor of the railroad company, and the plaintiffs made a motion for a new trial, which was overruled, and they excepted.

The evidence as to the cause of the fire was wholly circumstantial. It was shown that a few minutes before the fire was discovered two locomotives of the defendant passed the platform on which the cotton was situated; and a witness testified that he saw the smoke of one of them fall back over some of the cotton. This was the only evidence tending to connect the defendant with the burning. On the other hand, it was shown that a strong wind was blowing past the platform towards the engines and carrying the smoke away from, instead of in the direction of, the cotton; also that the smoke from a stationary engine at a cotton-gin on the other side of the platform had been blowing in the direction of the cotton about twenty-five or thirty minutes before the fire was discovered and for some time before that. The cotton was on the south side of the platform; the railroad track was at the east side, twenty-five or thirty feet from it, and ran north and south. The cotton-gin engine was southwest of it, a distance of about two hundred feet, and the arm of the smokestack pointed northward. Numerous witnesses testified as to the direction of the wind, and all of them agreed that it came from the southwest, and, according to some of them, it was blowing "fiercely," and the smoke could not have been carried from the locomotives back to the cotton on the platform. One of the witnesses stated that he came to town on the day of the fire about ten o'clock in the forenoon, and got out of his buggy at the southwest end of the platform, where the cotton was situated, and that the wind was blowing the smoke from the cotton-gin engine in his face and towards the cotton that was burned; that cinders and ashes were falling on his clothes and all around him. He remained in town about an hour and a half, and, when he left, the smoke and cinders were still blowing from the gin-engine. The fire was discovered about half-past two that afternoon. Other witnesses testified that sparks from the gin-engine had fallen on them as far as one hundred and seventy-five and two hundred and fifty feet from the engine, and on one occasion had set fire to trash near where the cotton was burned. No one testified as to having seen any sparks or cinders escape from the defendant's locomotives on the day of the burning.

The burden was upon the plaintiffs to establish by a pre-

ponderance of evidence that the fire was communicated from one of these locomotives. They showed at most a possibility that it came from that source. On the other hand, this was shown to be exceedingly improbable, if at all possible, while it was not only possible but altogether probable that the fire was caused by sparks from the cotton-gin engine. We think the evidence not only warranted, but demanded, the verdict.

The condition or management of the locomotives, which the plaintiffs claimed to be negligent, though it may have tended to show a possibility that sparks escaped from them on this occasion, would not in any other respect count against the defendant, unless it was satisfactorily established that sparks from that source did set fire to the cotton. The plaintiffs would have no right to complain of such negligence unless it was shown that they were injured by it. But even if it had been shown that the fire was communicated from one of the locomotives, there was sufficient evidence to uphold a finding that the company exercised all reasonable care and diligence in keeping them in proper condition, as well as in properly managing and operating them at the time and place in question; and if this was so the company would not be liable. Outside of the statement of a witness for the plaintiff, that wood-burning engines, as well as "coal-burners," needed wire-screens to prevent the escape of sparks, the only evidence as to the condition of the locomotives came from the defendant, and this evidence was to the effect that each of them had a spark-arrester of the latest improved pattern, which was well adapted to the purpose and was the best in use for that kind of engine; and that although no wire-netting was used in them, such netting was adapted only to coal-burning engines and not to this kind, these being wood-burners; that, where wood was burned, the netting would choke up and the engine would not draw. Several witnesses testified that the engines and the spark-arresters were in good condition and that nothing was out of order. A witness for the plaintiffs testified that there was a considerable exhaust from the engines as they passed the platform, and that they were running rapidly; but this was denied by each of the engineers. As we have said, however, even if it should be shown that there was negligence in the condition and running of the engines, the plaintiffs would have no right to complain of it unless they first showed that they were hurt by it; and this they have failed to do.

2. Error is assigned upon the refusal of the court to admit evidence that other engines of defendant, besides the two alleged in the declaration, had at other times emitted sparks at or near the place of the fire in question; this evidence being offered to show general carelessness or negligence on the part of the defendant. We think the court was right in declining to admit evidence of this kind. The declaration alleged that one of two particular engines caused the burning, and the engines referred to were distinctly identified. One was the Nancy Hart and the other the Ellen B. Peeples. It was not claimed that the fire was caused by any other. The question before the jury was whether it was caused by one of these, and the negligence alleged was negligence in the condition and management of these two. How then could it be material or relevant to show negligence on other occasions and in regard to other engines than these, especially when there was no attempt to show that such other engines were of like construction? The cases cited in support of the contention that this testimony should have been admitted are clearly distinguishable from the present case. In some of them the evidence as to other occasions related to the particular engine which was alleged to have caused the fire; and in the other cases the engine that caused the fire was not identified. Where the engine that caused the fire cannot be fully identified, evidence that the defendant's engines frequently emitted sparks on former occasions near the time of the fire in question is generally held relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter; but when the engine is identified, the same reason does not operate, and evidence as to the condition of other engines and of their causing fires is clearly irrelevant. To this effect see 2 Shearman and Redfield on Negligence, sec. 675, ed. 1888, and cases cited. See especially the following cases: *Albert v. Northern Cent. Ry. Co.*, 98 Pa. St. 316; *Erie Ry. Co. v. Decker*, 78 Pa. St. 293; *Coale v. Hannibal etc. R. R. Co.*, 60 Mo. 227; *Boyce v. Cheshire R. R. Co.*, 42 N. H. 97; *Jacksonville etc. R. R. Co. v. Peninsular etc. Land Co.*, 27 Fla. 1; *Ireland v. Cincinnati etc. R. R. Co.*, 79 Mich. 163; *Gibbons v. Wisconsin etc. R. R. Co.*, 58 Wis. 335. In the last of these, the question is considered at some length, and among the cases discussed is that of *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, which was the authority mainly relied upon by counsel for the plaintiff in error here.

It is said: "In that case, both in the brief of the learned counsel and in the opinion of Mr. Justice Strong, the language is very carelessly used, that evidence that the locomotives of the company, at other times and places on the same road, were so constructed as to scatter fire along the track might tend to prove a possibility, and a consequent probability, that some locomotive of the company caused the fire and show a negligent habit of the officers and agents of the railroad company." But in that case it is said in the opinion: 'The particular engines which caused the fire were not identified.' In such a case such evidence might tend to prove the possibility and consequent probability that some locomotive of the company caused the fire. This wonderfully loose logic may be satisfactory to a judicial mind in cases where there was no proof that any particular and identified locomotive caused the fire in question, if any locomotive of the company did. But in due deference to the learned judge who wrote the opinion, and the other judges who have used this language, it is submitted that a possibility can never establish a probability of a fact required to be proved in order to make a railroad company or any party liable in any action whatever, and the proposition is no sounder in logic than in law. It would be a monstrous doctrine that when a party is sued in tort for a personal injury to another, occasioned by his negligence in not furnishing proper appliances, or otherwise, his common carelessness, or carelessness in other cases, tends to prove the 'possibility,' and therefore 'probability,' that the act charged was the result of his negligence, without proof even that he committed it."

In the case of *East Tennessee etc. Ry Co. v. Hesters*, decided by this court at the last term (90 Ga. 11), in which the testimony as to the escape of sparks from engines of the defendant on occasions previous to the fire in question was held admissible, the evidence for the company showed that all the locomotives of the company were kept substantially in the same condition. Besides, in that case there was a general allegation that the fire was caused by the defendant's engines, and no particular engines were described or identified.

3. Complaint is made that the court erred in charging the jury upon the hypothesis of negligence on the part of the plaintiffs, because the instructions on this subject were inapplicable to the case and without evidence upon which to predicate them. If these instructions were erroneous, the error was not such as to require a reversal of the judgment. The

controlling issue in the case being whether or not the fire originated from sparks emitted by one of the defendant's locomotives, and the evidence showing clearly that it did not so originate, and consequently that the defendant was not liable, the instructions complained of probably did not influence the jury, or, if they did, they did not mislead as to the result; and the verdict being manifestly right, it should not be set aside.

Judgment affirmed.

RAILROADS—FIRE CAUSED BY SPARKS—BURDEN OF PROOF.—In an action for damages against a railroad company for injury caused by a fire alleged to have been caused by sparks from one of its locomotives, the plaintiff must prove that the sparks so emitted were the cause of the fire: *Henderson v. Philadelphia etc. Ry. Co.*, 144 Pa. St. 461; 27 Am. St. Rep. 652, and note; *Edrington v. Louisville etc. Ry. Co.*, 41 La. Ann. 96. After the plaintiff in such an action has proved that the locomotive of the defendant threw out the fire which caused the injury, he has made out a *prima facie* case of negligence against the railroad company: *Johnson v. Northern Pac. R. R. Co.*, 1 N. D. 354; *Fort Scott etc. R. R. Co. v. Karracker*, 46 Kan. 511. This question is thoroughly discussed in the monographic note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 71.

RAILROADS—LIABILITY FOR FIRE CAUSED BY SPARKS.—Where property is set on fire by sparks from a passing engine, the railroad is not liable if it was guilty of no negligence but used due care and skill in carrying on its business: *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124; 38 Am. Dec. 64, and extended note thoroughly discussing this subject: *Frankford etc. Turnpike Co. v. Philadelphia etc. R. R. Co.*, 54 Pa. St. 345; 93 Am. Dec. 708, and note; *Kentucky etc. R. R. Co. v. Barrow*, 89 Ky. 638: See also the extended note to *Flynn v. San Francisco etc. R. R. Co.*, 6 Am. Rep. 597.

RAILROADS—FIRE CAUSED BY SPARKS—EVIDENCE.—Where the fire resulting in the injury complained of is shown to have been set by a particular locomotive, evidence of fires set out by other locomotives is inadmissible: *Jacksonville etc. Ry. Co. v. Peninsular Land etc. Co.*, 27 Fla. 1; *Ireland v. Cincinnati etc. R. R. Co.*, 79 Mich. 163: See an extended discussion of this question in the note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 73. If, however, the action is to recover for a fire caused by an unidentified engine, evidence that the company's locomotives, many of them, at or about the time of the fire, threw out large sparks and kindled numerous fires upon that portion of the road is admissible: *Henderson v. Philadelphia etc. Ry. Co.*, 144 Pa. St. 461; 27 Am. St. Rep. 652, and see to the same effect: *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218; 67 Am. Dec. 155, and note.

JACKSON v. ROANE.

[90 GEORGIA, 669.]

ARBITRATION AND AWARD—ADMISSION OF EVIDENCE AFTER CLOSE OF CASE.—When the prevailing party in an arbitration proceeding, after announcing his case as closed and after the arbitrators have stated that no further testimony will be heard, produces evidence which is received to settle in his favor a conflict in the evidence without notice to or any opportunity afforded the losing party to hear or reply to such evidence, this is a sufficient ground for setting aside the award, without any charge of fraud, or evidence by the unsuccessful party that he is injured thereby.

ARBITRATION AND AWARD—AVOIDANCE OF AWARD FOR MISCONDUCT.—When a party attacking an award shows that the arbitrators, without notice to him, and after having announced that they would hear no further evidence, then proceeded to receive evidence in behalf of the successful and opposing party, there is no presumption that the attacking party consented thereto, nor is the burden of proof on him to show an absence of notice of the taking of such evidence.

ARBITRATION AND AWARD—ATTACK UPON.—When an award is attacked for misconduct on the part of the arbitrators and the successful party, the jury have no right to consider the legal ability, business skill, or systematic habits of the arbitrators in reaching a conclusion as to an issue of fact upon which the award may have been based.

H. T. Lewis, W. M. Sims, and W. M. and M. P. Reese, for the plaintiff in error.

W. M. Howard, B. S. Irvin, and W. Wynne and J. H. Lumpkin, for the defendant in error.

SIMMONS, J. Certain matters of dispute between Roane and Jackson were submitted to arbitration, and the award was in favor of Jackson. Roane filed exceptions, all of which were stricken out on demurrer, except one. In this exception it was complained that the award was illegal because of the improper conduct of the arbitrators in bringing before themselves one Vickers, after the testimony on both sides was closed, and taking his *ex parte* statement in the case, without notice to Roane or his counsel, and without affording them an opportunity to examine him. Jackson joined issue upon the exception, and on the trial of the issue attempted to show that there was a general agreement by the parties that the arbitrators might at any time call witnesses and continue the investigation after the parties had announced closed; also that, during the examination of Vickers, one of the counsel for Roane came into the room and heard him examined, and offered no objection. This was contradicted. According to

the testimony of Roane and his counsel no such agreement was entered into, and Vickers was examined without their knowledge or consent and after the arbitrators had announced that no further testimony would be heard. No notice was given them of the intention to examine the witness or of the time and place of the hearing, and they knew nothing of it until after the award was made. It appears also that the examination was had at the request of the successful party, to support him in a conflict between his own testimony and that of the opposite party. The jury found against the award "upon the specifications made in the issue submitted."

1. The plaintiff in error contends that before an award can be set aside on this ground, the excepting party must show that he was hurt by the misconduct complained of, especially if no fraud in the arbitrators is charged. It is assigned as error that the court refused to instruct the jury to this effect, but on the contrary charged them that no such burden was imposed.

There was no error in this. Misconduct of the kind here shown is of itself a sufficient ground for setting aside the award, and this is so whether fraud is charged or not. The code (sec. 2890) declares that, "to sustain an award no unfair advantage should be given to either party in the hearing of the case or the rendering of the award." It will hardly be questioned that in this case an unfair advantage was given the successful party, if it be true that at his instance, after he had announced closed, and after the arbitrators had stated that no further testimony would be heard, and without notice to the opposite party or any opportunity being afforded the latter to hear and reply to it, other testimony was received to settle in his favor a conflict between that party's testimony and his own. Certainly the complaining party, after showing these facts, will not be required to go further and probe the mind of each arbitrator, and show that the testimony thus improperly received operated against him in the making up of the award. It was incumbent rather upon the party who procured its introduction to show, if he could, that it was harmless.

In *Wilkins v. Van Winkle*, 78 Ga. 557, the prevailing party, in the absence of the other party, and after the evidence was closed, handed to one of the arbitrators a newspaper containing quotations of prices of oil and meal, and showing the difference between the good and bad kinds of them; and this

was made a ground of exception. The prices of oil and meal and the difference between the good and bad kinds were a material part of the inquiry before the arbitrators, but upon the trial of the exception the paper was not produced, and it did not appear what the prices quoted, or the differences shown by it, were. So there were no means of knowing whether the paper operated in favor of the party who gave it to the arbitrator or not. The party himself testified that he gave it to the arbitrator without any improper intention, and because he was informed that the arbitrator selected by the opposite party had requested it; that he did not think it was in his own favor; and did not offer it in evidence. It was held, nevertheless, upon this showing, coupled with the fact that the oath taken by the arbitrators was different from the one prescribed by the statute, that the setting aside of the award was proper. The leading case on this question is that of *Walker v. Frobisher*, 6 Ves. Jr. 70. In that case, as in this, the award was set aside because the arbitrator had received evidence after notice to the parties that he would receive no more. The arbitrator swore that this evidence had no effect upon his award. Lord Chancellor Eldon, however, in deciding the case, said: "The award may have done perfect justice, but upon general principles it cannot be supported." Such conduct, it was held, "must be fatal to the award." In *Morse on Arbitration and Award* it is said: "The rule of requiring the arbitrator to hear nothing on behalf of either party unless the other party is present, or has distinctly assented to his doing so, is generally very rigidly enforced. 'The smallest irregularity,' says Russell, 'is often fatal to the award.'" And, he adds, it makes no difference that the arbitrator acted from unimpeachable motives. (Page 126, ed. 1872, and pp. 533 et seq.) See also *Abbott's Trial Evidence*, ed. 1890, 470; *Watson on Arbitration*, 75; 11 Law Lib. 39. Stress was laid by the plaintiff in error upon the contention that the opposite party was himself examined *ex parte* after the testimony was closed. This was denied, but we think it immaterial whether he was so examined or not. On this subject we quote again from *Morse*: "It makes no difference that the party who objects to an award on the ground that a witness on behalf of the other party has been examined in his absence, and without notice to him, has himself been guilty of a like irregularity in privately communicating with

the arbitrator. It is not a case for balancing irregularities": Morse on Arbitration and Award, 127, and cases cited.

2. It is complained that the court erred in charging as follows: "If you should find from the evidence that the arbitrators closed the case as to the introduction of other evidence, and so announced, and if you should further find from the evidence that the witness Vickers was afterwards introduced and examined by the arbitrators without notice to the parties, the burden of proof is cast upon the person offering for judgment such award, to show to your satisfaction that the parties or their counsel consented thereto, and that the objector or his counsel knew of the introduction and examination of such witness and did not object thereto, or was present, or otherwise waived notice or objections thereto, until after the award was made."

While it is true that the party attacking an award must negative the presumptions in its favor, we think when he shows that the arbitrators, without notice to him, and after having announced to him that they would hear no further evidence, nevertheless did so, there is no presumption that he consented. The absence of notice under such circumstances is *prima facie* irregular, especially where, as in this case, it appears that the hearing of such evidence was had in behalf of the opposite party. There was no error, therefore, in charging the jury that the burden was upon the party offering the award for judgment to account for the absence of notice.

3. It is complained that the court erred in charging that the jury were not authorized to consider the legal ability, business skill, or systematic habits of the arbitrators in reaching a conclusion as to the issue of fact in the case. That issue was whether they heard evidence in the absence of the excepting party or his counsel without notice or consent. Clearly, the ability or systematic habits of the arbitrators would be inadmissible as evidence to show whether they did this or not, and, *a fortiori*, could not be considered when there was no proof about them. It appears from the motion for a new trial that this charge was given because counsel for the movant had contended in his argument to the jury that in determining the issue they should take these things into consideration.

4. The evidence warranted the verdict, and there was no error in overruling the motion for a new trial. Exceptions *pendente lite* to the overruling of the demurrer to the excep-

tion upon which the award was set aside were sent to this court by the clerk as a part of the record, but no reference is made to them in the bill of exceptions, and no error assigned therein upon the overruling of the demurrer.

Judgment affirmed.

ARBITRATION—MISCONDUCT OF ARBITRATORS—IMPEACHMENT OF AWARD. An award will be set aside where the conduct of one of the arbitrators amounts to misbehavior, and results in injury to one of the parties: *Shipman v. Fletcher*, 82 Va. 601; *Robinson v. Shanks*, 118 Ind. 125. This question is discussed in the notes to the following cases: *Brush v. Fisher*, 14 Am. St. Rep. 518; *Jocelyn v. Donnel*, 14 Am. Dec. 754; *Mornville v. American Tract Society*, 25 Am. Rep. 46. A court may vacate an award for corruption, fraud, misconduct, or misbehavior: *Smith v. Cutler*, 10 Wend. 589; 25 Am. Dec. 580, and note. Awards will be set aside for fraud, accident, or mistakes: *Rand v. Redington*, 13 N. H. 72; 38 Am. Dec. 475, and note; *Muldrow v. Norris*, 2 Cal. 74; 56 Am. Dec. 313, and note. An award will be set aside for partiality or corruption of the arbitrators: *Emerson v. Udall*, 13 Vt. 477; 37 Am. Dec. 604, and note; *Moshier v. Shear*, 102 Ill. 169; 40 Am. Rep. 573.

CRAWFORD v. STATE.

[90 GEORGIA, 701.]

ROBBERY.—TO CONSTITUTE ROBBERY there must be force or intimidation, asportation without the consent of the owner, and an intent to steal. Hence when a person takes property from another under a *bona fide* claim of right, and for the purpose of applying it to the payment of a debt due from the latter, the crime of robbery is not committed. It is otherwise if the claim of right is a mere pretense, and when the question whether or not such claim is *bona fide*, or a mere pretense, is in doubt it should be submitted to the jury for determination.

ROBBERY.—TO CONSTITUTE ROBBERY it is not necessary that the taking should be directly from the person of the owner. It is sufficient if it is done in his presence, against his will, by violence or putting him in fear.

ROBBERY.—RIGHT TO KILL IN DEFENDING AGAINST a robbery does not end as soon as there is such change of possession of the property taken as will render the crime technically complete. Such right remains with the owner so long as his property is in his immediate presence, and the killing of the robber will prevent it from being carried away.

MURDER—MANSLAUGHTER—RESISTING TRESPASS.—Although a trespass, not amounting to a felony, will not justify murder, and is not of itself sufficient to reduce a homicide to manslaughter, yet if the circumstances show that the killing was the result of a sudden, violent impulse of passion, provoked by the trespass, especially if accompanied by an assault with a deadly weapon, and acted upon before the passion has time to cool, this is such provocation as will operate to reduce the crime to manslaughter.

MURDER—RIGHT TO RESIST TRESPASS.—Section 4332 of the Georgia code, declaring that "if after persuasion, remonstrance, or other gentle means

used, a forcible attack and invasion on the property or habitation of another cannot be prevented it shall be justifiable homicide to kill the person so forcibly attacking and invading," has no application when the property attacked or invaded is so inconsiderable that the injury intended is not serious, but slight, and does not involve a felony, such as the severing from a side of meat a small portion thereof.

J. W. Walters, and Harrison and Peebles, for the plaintiff in error.

J. M. Terrell, attorney-general, and W. N. Spence, solicitor-general, for the state.

SIMMONS, J. Crawford was found guilty of murder; his motion for a new trial was overruled, and he excepted. It appeared from the evidence that while the defendant was driving his wagon along the highway, the deceased drove up behind in a buggy, whipping his horse and holloaing, and upon being asked by another person present whether he was drunk, and what was the matter with him, answered: "No, by G—d, I am not drunk; Warren [the defendant] treated me wrong in town." The defendant and the deceased quarreled for awhile, but finally desisted; and when they got to a certain point in the road, where the deceased stopped, one of the party proposed to the defendant that they should drive on ahead, so that the deceased would not catch up with them, and they did so; but the deceased soon overtook them, jumped out of his buggy, ran around to the front of the defendant's wagon, calling to him, "G—d damn it, stop your mules and take my things out," and caught hold of the lines and stopped the mules himself. The "things" referred to by the deceased were articles he had hired the defendant to carry for him in the wagon. The defendant handed them to the deceased, and the latter, after putting them down, stepped to the wagon and took out a piece of meat weighing several pounds, which belonged to the defendant, and threw it on the ground with his own things. The defendant said: "By G—d, what does that mean?" The deceased replied that he was going to have a quarter's worth of the meat, and that the defendant owed him a quarter. The defendant said he did not have the money then, but would pay it when they reached his house, if the deceased would wait until they got there. One of the party said he would pay the money for the defendant himself, but the deceased refused to wait or to take the money offered him, and insisted that he was going to take enough of the defendant's meat to pay himself. The defendant begged him

not to do so, saying that he had to carry it home to live on, and that if deceased persisted in taking it he would hurt him. The deceased paid no attention to the protests of the defendant, but began cutting the meat. The defendant attempted repeatedly to snatch the meat away from him or to push him off from it, but each time he attempted to do so the deceased "raked" or cut at him with his knife, and began again to cut the meat. After the defendant's last attempt to get the meat away from the deceased in this manner had proved unsuccessful he stepped back and picked up a fence-rail lying near, which was about ten feet long and the thickness of a man's arm, and when the deceased had nearly finished cutting off a piece of the meat, probably about two pounds and a half, struck at him sidewise, hitting him on the head, and knocking him away from the meat. He then threw down the rail, picked up the meat and put it back in the wagon, and went on his way. The blow cut the skin and made a wound about two inches long on the head of the deceased, but it did not appear that the skull was broken. From this wound he died the next day.

1, 3. The theory of the defense was that the killing was justifiable, because done to prevent a robbery, and that if the deceased was not attempting a robbery, his trespass upon the defendant was such that the homicide, if not justifiable, was not murder but merely manslaughter. In defense of his property "against one who manifestly intends, by violence or surprise, to commit a felony" thereon, a person may kill the aggressor, if he does so under a reasonable belief that the killing is necessary for that purpose: Code, sec. 4330; 1 East P. C. 271; 1 Bishop's Criminal Law, 8th ed., 853, 875. To constitute robbery, there must be force or intimidation, asportation without the consent of the owner, and an intent to steal. It is unnecessary that the taking shall be directly from the person of the owner; it is sufficient if it is done in his presence, against his will, by violence, or putting him in fear: *Clements v. State*, 84 Ga. 660; 20 Am. St. Rep. 385; 2 Bishop's Criminal Law, 8th ed., sec. 1178. It was contended on the part of the state that in this case the trespass could not have amounted to a robbery, because the taking was under a claim of right, with the purpose of applying the property taken to the payment of a debt from the defendant to the deceased. It is true such a taking, although wrongful and violent, would not be robbery if the claim of right was

in good faith, and if the taking was for no other purpose than to satisfy the claim; in such case the *animus furandi* would be lacking. But it would be otherwise if the claim of right was a mere pretext covering an intent to steal: 2 Bishop's Criminal Law, 8th ed., sec. 1162a, and cases cited; 2 Russell on Crimes, *111-114; *Long v. State*, 12 Ga. 293. Although in this case the indications of such an intent are slight, there were circumstances, such as the refusal of the deceased to wait until they arrived at the defendant's house, and his refusal to take the amount offered him in payment of his claim, and perhaps the quantity of meat the deceased was taking, which might have led the defendant to suppose that the taking was not so much to secure payment of the amount claimed, as it was to deprive him of his property or of an undue quantity of it, and thereby obtain a fraudulent advantage. The trial judge ought therefore to have submitted to the jury the question whether, under the circumstances in evidence, the defendant had reason to believe that the claim of right was made and acted upon in good faith, or was merely a pretext resorted to as cover for a fraudulent intent.

In charging upon the right to kill in defending against a robbery, the court instructed the jury that this right would not exist after the possession of the property had passed from the owner to the person taking. This instruction, under the evidence in this case, was improper; because no such change of possession as had taken place would cut off the right of the defendant to protect his property against a felonious taking, the property being still in his immediate presence, and the deceased being then engaged in severing that part of the meat which he had said it was his intention to take, and in resisting with his knife the efforts of the defendant to prevent him from carrying out this intention. The taking was not a past, but a present and progressing, injury; and if the defendant acted under a reasonable belief that the purpose of the taking was robbery, he had the right to arrest it in the manner he did, although there may have been already such a change of possession as would in law amount to a robbery. The right of the owner of property to defend it against a felonious taking, to the extent if necessary of killing the person taking, does not end at the moment the guilt of that person is technically complete. It extends not merely to the prevention of such asportation as may be sufficient to render the person taking guilty of robbery, and which may be effected.

by the slightest change of possession, but to the prevention of his carrying off the property which he has thus gotten from the owner. The object of the law being to allow the owner to protect his property against the robber, it would be unreasonable to hold that at the moment such asportation is accomplished, and before the robber has gotten away with the article taken, the right of the owner to defend his property is at an end; and that where the moment before he could lawfully kill in defense of it, he must yield after the slightest change of possession has been effected, and if he then killed the robber to prevent the article from being carried off, would be guilty of murder. The effect of the instruction, as to change of possession, was to exclude the defense that the killing was done to prevent a robbery; and although, as we have said, the evidence to sustain this theory is slight, the jury were authorized to adopt it, and might have seen proper to do so, had it not been for the charge referred to.

If, however, the evidence does not sustain this theory, we think it tends rather to make out a case of manslaughter than of murder; though we do not go to the length of upholding the position taken by counsel for the accused, that a homicide to prevent a mere trespass not amounting to a felony is manslaughter only. That view finds no sanction in any adjudication of this court, nor in the authorities generally; at least, where, as in this case, the trespass is upon property of trifling value, not at the habitation. In *Hayes v. State*, 58 Ga. 46, it is said that "to intentionally kill, with a deadly weapon, one who is committing a trespass upon property is generally murder, and not manslaughter," and that no exception to this general rule is involved where the trespass is "the appropriation and removal of a small piece of timber of trifling value." And it is explained that what is said in *Monroe v. State*, 5 Ga. 86, relied upon by counsel here, and in *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269, to the effect that a trespass amounting to a misdemeanor will reduce the killing to manslaughter, "refers to trespass affecting the person and not to trespass affecting the goods only." See also Wharton on Homicide, sec. 414; Kerr on Homicide, secs. 12, 13, 149, 185; 9 Am. & Eng. Ency. of Law, 586. But while a trespass of this kind does not justify a killing, and is not of itself sufficient to reduce the homicide to manslaughter, yet if the circumstances should show that the killing was the result of a sudden, violent impulse of passion, provoked by the trespass,

and acted upon before the passion had time to cool, we think the trespass would amount to such a reasonable provocation as in law would justify the excitement of passion, and thus operate to reduce the offense to manslaughter; certainly this would be so, if, as in this case, the trespass was accompanied with assaults against the person of the owner with a knife, in resistance to his efforts to prevent the trespasser from carrying away his property. Some of the authorities, it is true, "appear to lay down the doctrine, that, though the passions become excited in the mere defense of property, other than the dwelling-house, a killing with a deadly weapon used in such defense, or other like dangerous means, is murder," but this doctrine, says Mr. Bishop, 2 Crim. Law, 7th ed., sec. 706, note, "though stated many times in the books, is not sufficiently founded in actual adjudication to be received without further examination. For surely, although a man is not so quickly excited by an attack on his property as on his person, and therefore the two cases are not precisely on the same foundation, yet, since he has the right to defend his property by all means short of such as produce death, if, in the heat of passion arising during a lawful defense, he seizes a deadly weapon, and with it unfortunately takes the aggressor's life, every principle which in other cases dictates the reduction of the crime to the mitigated form requires the same in this case." See also 9 Am. & Eng. Ency. of Law, 586, 587; 1 Wharton's Criminal Law, 9th ed., sec. 462. The kinds of provocation which our code, in defining what shall constitute voluntary manslaughter, declares insufficient to reduce the homicide to that grade, are "words, threats, menaces or contemptuous gestures": section 4325; but it does not exclude from among the reasonable grounds of provocation a trespass upon property, accompanied with such hostile demonstrations against the person of the owner as were shown to have taken place in this case. The test laid down by this section, by which to determine whether the offense shall be reduced to manslaughter, is, that "the killing must be the result of that sudden, violent impulse of passion supposed to be irresistible," and that "there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied."

In the present case we think the circumstances conform to this test. We think they may properly be classed among those circumstances which justify the excitement of passion, and exclude the idea of deliberation or malice. The deceased, as we have seen, was the aggressor, having provoked the first quarrel, and having afterwards followed up the defendant when the latter was seeking to get away from him, and renewed the difficulty by taking the defendant's meat, and proceeding, despite his remonstrances, to cut it up, with the avowed intention of carrying off a part of it; at the same time adding to the provocation by making repeated assaults against the defendant with a knife while he was seeking to get back his property; and this notwithstanding the money claimed to be due from the defendant had then and there been offered to the deceased. The use of a weapon by the defendant was evidently an afterthought, and was resorted to only after his repeated efforts to get back his property without such means had proved unavailing, and after he had been wrought up by continued provocation. In this emergency, and acting in the heat of the moment, he picked up the rail, a chance weapon, probably the first thing he saw lying at hand, and struck at the aggressor with it, hitting sidewise, and apparently, as a witness testified, with the purpose of knocking him away from the meat, rather than of taking his life. He struck but one blow, and made no further demonstration against the deceased, but at once threw down the rail, picked up his meat, and went on his way. There is no indication of deliberation or premeditation on the part of the defendant; there is no showing of express malice, and the circumstances tend strongly to rebut the implication of malice which arises from the dangerous character of the weapon. See *Ray v. State*, 15 Ga. 223, 244, where it is said: "The fact that a prisoner had accidentally and hastily taken up a board, with which, in a conflict, he inflicted blows that produced death, and had not provided the same or any other deadly instrument beforehand, is a circumstance which does not favor the conclusion that malice should be implied because a weapon was used likely to produce death." It is likely that if the law of manslaughter had been explained to the jury in such a manner as to enable them to understand its application to the state of facts before them, they would not have found the defendant guilty of murder. The court, it is

true, gave in charge the sections of the code defining manslaughter, but did not add such explanations as would have been proper to aid the jury in applying the law, as therein stated, to the circumstances of this case. Upon the whole, we are satisfied, after a careful review of the record, that the ends of justice will be subserved by awarding a new trial.

4. It is complained that the court erred in charging that section 4332 of the code, which declares that "if after persuasion, remonstrance, or other gentle means used, a forcible attack and invasion on the property or habitation of another cannot be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading," etc., does not apply to the defense of property which is not at the habitation. It is questionable whether this construction is correct, although it is in accord with the view expressed by Lochrane, C. J., in *Pound v. State*, 43 Ga. 89. What was there said on this subject, however, was unnecessary to the adjudication in that case, and is to be taken as *dictum* merely. But whether this construction is correct or not, the section quoted does not apply to every attack or invasion on property. The concluding part of the section says, it must appear "that a serious injury was intended, or might accrue, to the person, property, or family of the person killing." It has no application where the property attacked or invaded is so inconsiderable that the injury intended is not serious but slight—such as severing from a side of meat a small part of it—certainly not where the injury is not proceeding to a felony. It would be out of harmony with the general spirit of the law of homicide, which should govern in the construction of this section of the code, to treat the section as authorizing the taking of human life for a trivial injury to property not involving a felony. It could not have been the intention of the codifiers or of the legislature, in adopting the penal code, to make such a radical departure from the established law on this subject as it stood before the adoption of the code; and the section has never been so understood by this court. If the deceased in this case intended a felony, and if this section was applicable, the defendant lost nothing from the fact that the court treated it as inapplicable, the law as to the defense of property against a felony being given in charge, as laid down in section 4330 of the code.

Judgment reversed.

ROBBERY—COMPELLING PAYMENT OF DEBT.—When the defendant, by means of threats of personal violence and menaces, compelled another to pay him money which the defendant believed to be justly due him, it is not robbery: *State v. Hollyway*, 41 Iowa, 200; 20 Am. Rep. 586. See *People v. Anderson*, 80 Cal. 205.

ROBBERY—NECESSITY FOR TAKING FROM PERSON.—It is not necessary in a case of robbery to prove that the property was actually taken from the person of the owner; it is sufficient if it is taken in his presence: *Olements v. State*, 84 Ga. 660; 20 Am. St. Rep. 385, and note; extended note to *State v. McCune*, 70 Am. Dec. 181.

HOMICIDE—MANSLAUGHTER—HEAT OF PASSION.—Sudden provocation acted on in the heat of passion produced thereby reduces a homicide to manslaughter if the provocation is of such a character as would in the mind of a reasonable man stir resentment to violence endangering life: *Holmes v. State*, 88 Ala. 26; 16 Am. St. Rep. 17, and note; *Mealy v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477, and note; *Campbell v. Commonwealth*, 88 Ky. 402; 21 Am. St. Rep. 248. Before a homicide can be accounted manslaughter, the killing must be the result of that violent impulse of passion supposed to be irresistible: *Nowaczyk v. People*, 139 Ill. 336; *Brooks v. Commonwealth*, 61 Pa. St. 352; 100 Am. Dec. 645; *Maher v. People*, 10 Mich. 212; 81 Am. Dec. 781, and note; *Commonwealth v. Webster*, 5 Cash. 296; 52 Am. Dec. 711; *Sutcliffe v. State*, 18 Ohio, 469; 51 Am. Dec. 459, and note; *McWhirt's Case*, 3 Gratt. 594; 46 Am. Dec. 196, and note.

HOMICIDE—DEFENSE—DEFENSE OF PROPERTY.—A person may employ force against one who intends or endeavors, by violence or surprise, to commit a felony on his person, habitation, or property, and, if he necessarily takes life, the killing is justifiable: *State v. Thompson*, 9 Iowa, 188; 74 Am. Dec. 342, and note; *Noles v. State*, 26 Ala. 31; 62 Am. Dec. 711, and note; *State v. Rutherford*, 1 Hawks, 457; 9 Am. Dec. 658; *Carroll v. State*, 23 Ala. 28; 58 Am. Dec. 282, and note; but no mere trespass upon the personal property of another will justify the killing of a man: *McDaniel v. State*, 8 Smedes & M. 401; 47 Am. Dec. 93, and note; *Harrison v. State*, 24 Ala. 67; 60 Am. Dec. 450, and note.

GIBSON v. ROBINSON.

[90 GEORGIA, 756.]

PLEADING—EVIDENCE.—When, in an action on an administrator's bond, the declaration sets forth substantially the contents of the bond sued on, and the facts constituting a breach thereof, it is not necessary that a copy of the bond be attached to the declaration in order that the bond itself may be admissible in evidence.

JUDGMENT AGAINST PRINCIPAL—EFFECT OF ON SURETY.—A judgment against an administrator who fails to plead a want of assets in an action upon an alleged debt against his intestate is conclusive upon him of a sufficiency of assets to pay such debt; but in an action against the sureties upon his bond such judgment is *prima facie* evidence only, and they may plead and prove a want of assets in the hands of their principal liable to the payment of such debt.

JUDGMENTS—HOW PROVED.—When a judgment is relied on as an estoppel or as establishing any particular state of facts of which it is the judicial

result, it can be proved only by offering in evidence a complete and duly authenticated copy of the entire proceedings in which the judgment was rendered; but when the only direct object to be subserved is to show the existence and contents of such judgment, a certified copy of the judgment of a court of record possessing general original jurisdiction is admissible by itself to prove its rendition and contents, and when admitted in evidence all legal incidents attach which the law annexes to judgments of that class.

JUDGMENTS.—EXISTENCE AND CONTENTS OF JUDGMENT RELIED UPON AS ESTOPPEL MAY BE PROVED by producing a certified copy of the judgment entry of a court of record possessing general original jurisdiction, and such copy is *prima facie* evidence of a valid judgment, but it is not conclusive either of the jurisdiction of the parties, service or of any other matter material to the rendition of a valid judgment. If the party against whom it is offered can derive any benefit from proving the antecedent or subsequent proceedings, or the want of any legal essential, he is at liberty to introduce the entire record.

EXECUTIONS.—SUFFICIENCY OF RETURN.—A return by a sheriff upon an execution against an administrator as follows, "After search and inquiry, I know of no property of the defendant in the county upon which to levy this *f. fa.*," must be construed to mean that such officer can find no property in the hands of the administrator belonging to the estate which he represents, and is a sufficient return of *nulla bona*. The word "defendant," as used in such return, is employed to designate such person in his representative and not in his individual capacity.

ACTION on an administrator's bond. The declaration was demurred to on the ground that neither the bond sued on nor a copy thereof was attached thereto. Error is assigned in overruling such demurrer and in admitting the bond in evidence. The declaration alleged in substance that on August 31, 1889, O. C. and W. C. Gibson jointly and severally entered into an administrator's bond by which they obligated themselves as the sureties of O. C. Gibson in the sum of six thousand five hundred dollars for his lawful administration of the estate of L. A. Gibson, deceased; that the estate thus passing into the hands of O. C. Gibson to be administered upon was of the value of five thousand dollars or other large sum; that said L. A. Gibson at her death was indebted to E. H. Robinson, plaintiff's use, in the sum of twelve hundred dollars, besides interest and attorney's fees, on a note which said administrator failed to pay; that after judgment had been obtained against said administrator on said note execution was issued against the estate of said L. A. Gibson in the hands of her said administrator, and that the sheriff made return to such execution that there was no property of said L. A. Gibson upon which to levy such execution; by reason of which facts a breach of said bond has been established,

and the sureties therein have become jointly and severally liable for the amount of such judgment in favor of plaintiff. Certain pleas of defendant W. C. Gibson were stricken out by the court below, and the ruling is assigned as error. These pleas were in substance that he is not indebted to plaintiff in any amount, and that the judgment obtained by the latter is not binding or conclusive upon him as surety; that it was obtained against such administrator, not because of any laches or negligence on his part or that of his surety, but as the result of a mistake under which such administrator was laboring; that such administrator did not receive the sum of five thousand dollars or other large sum belonging to the estate of L. A. Gibson, and the total amount received by him was sixteen hundred and seven dollars and ninety cents; that such administrator in his return set up that he received the sum of five hundred and seventy-six dollars on certain notes which never should have been included in the return as belonging to the estate, and should not have been appraised as the property of the estate, and that the reason that they were so appraised and returned was that said L. A. Gibson, prior to her death, owed debts to several persons, which debts, being pressed for payment, she requested W. C. Gibson to pay them, but, he being unable to pay them, O. C. Gibson did arrange with her to pay them, and to receive, hold, and collect said notes to reimburse himself. He then paid such debts to the amount of five hundred and sixty-seven dollars. That O. C. Gibson objected to having such notes appraised as part of the estate of his intestate, claiming them as his individual property, and consented to their appraisal as part of the estate only for the purpose of providing against any overplus in favor thereof after he had collected the notes and paid said debts, hence is not responsible for them as part of such estate; that the administrator paid out nine hundred and eight dollars and eighty-four cents on debts superior to that of the plaintiff, and that there is still five hundred dollars outstanding against the estate on liens which are superior to that of plaintiff; also other claims amounting to two hundred and fifty-five dollars and fifty cents, of which notice has been given to such administrator; that all money from every source belonging to the estate which has come into the hands of such administrator is sixteen hundred and seven dollars and ninety cents; that the failure of O. C. Gibson as administrator to file proper pleas to the action of plaintiff E. Rob-

inson was due to his mistake and misinformation, for which the defendant as surety is not responsible, and that if such pleas had been filed and proved said E. Robinson would not have obtained the said judgment for the amount now insisted on; that since said judgment was obtained new facts concerning the condition of the estate have come to the knowledge of the administrator, which the surety is entitled to urge for his protection and benefit; that amongst other new matters said administrator, since the rendition of said judgment, has found certain vouchers and receipts showing the payment of certain claims against the estate, and which should have been used in defense to said action, and which are still subject to the use of the surety as a defense; that such administrator in good faith paid out various sums on claims, believing them to be entitled to payment in preference to the debt of plaintiff, and his mistake has since become known to him through his attorney; that the defendant is entitled to show in defense the respective ranks and dignity of the claims so paid in order to fully protect himself; that the judgment of said E. Robinson should not be enforced in its full amount, but should be reduced in proportion to the amount remaining in the hands of the administrator after claims superior to it have been paid. The plaintiff introduced a certified copy of the judgment in favor of E. Robinson and against O. C. Gibson, administrator of the estate of L. A. Gibson. Its admission in evidence was objected to by the defense on the ground that the copy was not accompanied by the record of any suit showing the judgment to have been properly rendered, and that it did not appear that any suit had been instituted upon which to base such judgment, and that such judgment was not admissible to charge the surety with liability to the plaintiff. This objection was overruled, and the defendant appealed on the grounds mentioned as error.

C. C. Kibbee and Estes and Estes, for the plaintiff in error.

Gustin, Guerry, and Hall, for the defendant in error.

LUMPKIN, J. 1. The plaintiffs, in their declaration, set forth substantially the contents of the bond sued on, and the facts constituting a breach thereof. Certainly, this is all that could be required of them. The form of pleading set forth in section 3391 of the code, commonly known as one of the "short" forms, is but cumulative in its character; its use is permis-

sive, not obligatory. It follows, without argument, that there was no merit in the objection urged to the admission of the bond itself in evidence, on the ground that neither the original bond nor a copy thereof being attached to the declaration, "there was no evidence that the bond introduced was the one sought to be enforced."

2. The principle contained in the second head-note has been so often recognized by this court as to have become settled law in this state. It was announced as far back as the first volume of our reports: *Bryant v. Owen*, 1 Ga. 355; and as said by Justice Blandford in *Bennett v. Graham*, 71 Ga. 213, "such have been the continuous and uninterrupted rulings of this court": See cases cited. Further than to say we think the principle fully applies to the facts of this case, discussion of the subject would seem unnecessary and unprofitable. It was error to strike the special pleas filed by the surety on the bond, the court holding, in effect, that the judgment rendered against the administrator in favor of the plaintiffs was equally binding upon the surety. The pleas were at least good in substance, and the surety being deprived by such erroneous ruling of so important a branch of his defense, the case must be sent back for a new trial.

After defendant's special pleas were stricken, certain evidence was sought to be introduced in defense under the plea of the general issue. To the refusal of the court to allow the introduction of such evidence numerous grounds of exceptions are presented. From such consideration as we have given to the evidence thus set forth it would appear that no question as to its admissibility could arise if the tender was made under the pleas which were improperly stricken by the court. This being so, under the ruling herein made, these questions will not likely arise upon the rehearing of the case, and therefore need not be considered further.

3. It is well recognized as a general rule that where a judgment is relied on as an estoppel, or as establishing any particular state of facts of which it was the judicial result, it can be proved only by offering in evidence a complete and duly authenticated copy of the entire proceedings in which the same was rendered; but where the only direct object to be subserved is to show the existence and contents of such judgment, this rule does not apply, and a certified copy of the judgment entry of a court of record possessing general original jurisdiction is admissible, by itself, to prove rendition

and contents: 2 Blackstone on Judgments, sec. 604; 1 Greenleaf on Evidence, sec. 511. Such entry will be *prima facie* evidence of a valid judgment, and, on being admitted, all the legal incidents attach which the law annexes to judgments of that class. It will not, however, be conclusive either of jurisdiction of the parties, service, or of any other matter material to the rendition of a valid judgment; and of course, if the party against whom it is offered can derive any benefit from proving the antecedent or subsequent proceedings, or the want of any legal essential, he is still at liberty to introduce the entire record. Thus it will be seen that the exception to the general rule, while of material advantage and convenience to the one, can result in no hardship upon the other of the parties. The reasons for this exception, as well as those which support the general rule, will appear upon examination of the following cases, which we cite as persuasive authority for the ruling announced in the third head-note: *Adams v. Olive*, 62 Ala. 418, following previous decisions in *Locke v. Winston*, 10 Ala. 849; *Doe ex d. Starke v. Gildart*, 4 How. (Miss.) 267; *Carson v. Doe ex d. Huntington*, 6 Smedes & M. 111; 45 Am. Dec. 273; *Henderson v. Cargill*, 31 Miss. 367; *McGuire v. Kouns*, 7 T. B. Mon. 386; 18 Am. Dec. 187; *Chinn v. Caldwell*, 4 Bibb, 543; *Lee's Adm'r. v. Lee*, 21 Mo. 531; 64 Am. Dec. 247; *Haynes v. Cowen*, 15 Kan. 637; *Rathbone v. Rathbone*, 10 Pick. 1; *Gardere v. Columbian Ins. Co.*, 7 Johns. 514; *Jones v. Randall*, Cowp. 17; *Clark v. Hebert*, 15 La. Ann. 279; *Stafford's Succession*, 2 La. Ann. 886; *Price v. Emerson*, 14 La. Ann. 187.

Rightly understood, the case of *Mitchell v. Mitchell*, 40 Ga. 11, presents no conflict with what we have just ruled. A verdict of a jury is not a judgment or decree, and even when accompanied by the pleadings would not be admissible in evidence for most purposes if no judgment or decree appeared. In *Dupont v. Mayo*, 56 Ga. 304, the judgment or order of the ordinary was sought to be used as adjudicating a discharge of one of the sureties on a prior bond, and as operating incidentally to discharge a surety on the bond in suit. The judgment of discharge, so far from declaring that the guardian was then required, or had been required, to execute a third bond to take the place of the first, indicated on its face that the third was a voluntary bond. It sought to substitute this voluntary bond for the first of the preceding bonds, and declared the discharge of Smith as the result of this substitution. The

guardian had been previously required to give the second bond as an addition to the first. He had complied with this requisition, and his compliance was expressly announced by an order passed by the ordinary. After this took place, and without any further citation of the guardian or any further requirement made of him, another term of the court arrived, and at that term a voluntary bond previously executed was offered and accepted, and the discharge of Smith declared. This discharge was consequently based, apparently, on no proper statutory proceeding. The terms of the order indicated some informal proceeding by consent; and this being so, it devolved upon the party seeking to introduce the order to show the essential preliminaries. The reasoning of the opinion may go too far, but limited and explained by the facts of the case it led to no incorrect result.

A judgment is the conclusion of the law upon matters contained in the record. Whenever it is sought to establish the conclusion merely and the contents thereof, the judgment is admissible by itself; but when the object is to show any of the premises from which the conclusion was drawn, then the whole record must be produced. The contents of the judgment, the relation of the parties, or other facts expressed therein, are part and parcel of the conclusion. So, likewise, are any legal incidents which the law attaches to these contents.

It only remains to apply the doctrines above announced to the facts of the case now under consideration. In order to show a right of action on the bond, it was incumbent on the plaintiffs to establish a *devastavit* by the administrator. The judgment entry being *prima facie* correct, the existence of the judgment as a fact would be established. One of the questions the judgment must necessarily have adjudicated was, "sufficiency of assets," as such is the effect the law gives to judgments of that class when shown to exist. Therefore, to prove the *devastavit*, it was necessary to show simply the existence of such judgment, execution issued thereunder, and proper return of *nulla bona*. It was only to prove the fact of rendition of the judgment, and the contents thereof, that a certified copy of the judgment entry of Jones superior court was tendered in evidence. The existence and contents of such judgment was the sole subject of inquiry so far as the suit which resulted in it was concerned, and it follows from what has been said that the trial judge properly allowed the judgment proved in the manner objected to.

4. To the introduction in evidence of the execution issued under this judgment, objection was made "on the ground that there was no proper and legal return or entry of *nulla bona* on said *fiery facias*." Upon the *fiery facias* are two entries, one made by the sheriff of Jones, the other by the sheriff of Twiggs county. Save as to the county named, the language employed is the same in one as in the other: "After search and inquiry, I know of no property of the defendant in the county . . . upon which to levy this *fiery facias*." The specific objection raised to the return is, that the levying officer in each instance describing his search to have been for property of the "defendant," it is impossible to determine "whether said sheriffs meant that they could not find any property of the estate of Lucinda A. Gibson, or whether it was property of O. C. Gibson personally they were unable to find." The execution directs the money to be made of the "goods and chattels, lands and tenements . . . that were of the estate of Lucinda A. Gibson, and that may have come into the hands of O. C. Gibson as the administrator of her estate to be administered." It would therefore seem to us that the most natural, reasonable, and sensible construction which could be given to the returns in question would be, that the levying officers conducted their search for property such as is described in the *fiery facias*, rather than for property owned by Mr. Gibson personally; and that in speaking of him in their returns as "defendant" merely, they meant to refer to him in his representative, not in his individual, capacity. But even if equally susceptible of the construction contended for by counsel, our decision must be the same, for: "The return of an officer should receive every reasonable intendment and construction, and where it is susceptible of different meanings, that meaning must be adopted which is most conformable to his legal duty. The question must be whether, by a rational construction of the return, the requisite facts appear.

. . . The use of the return is to show the truth of the matter to the court, and the certainty of common-law pleading is not required in it. If there be ambiguity in it, it is the rule that, as the sheriff has acted officially, the construction given should be that most favorable to his having discharged his duty": *Murfree on Sheriffs*, sec. 864.

5. It necessarily follows from what has been said in the second division of this opinion, that the trial judge further

erred in directing a verdict in favor of the plaintiffs in the court below.

Judgment reversed.

SURETYSHIP—JUDGMENT AGAINST PRINCIPAL, EFFECT ON SURETY.—Sureties are bound by a judgment against the principal in the absence of fraud or collusion, although they were not parties to the action: *Pascwalk v. Bollman*, 29 Neb. 519; 26 Am. St. Rep. 399, and note; *Charles v. Hoskins*, 14 Iowa, 471; 83 Am. Dec. 378, and extended note thoroughly discussing this subject.

JUDGMENTS—HOW PROVED.—The transcript of a portion only of a record is admissible in evidence, when it is offered simply to shew that there was a judgment to support the execution: *Lee v. Lee*, 21 Mo. 531; 64 Am. Dec. 247, and note; *Masters v. Varner*, 5 Gratt. 168; 50 Am. Dec. 114, and note. Final entry upon the record, without showing any of the previous proceedings on which it should have been based, is insufficient proof of a judgment: *Kenyon v. Baker*, 16 Mich. 373; 97 Am. Dec. 158. A judgment in the cause in which it was rendered can only be proved by the record itself or by certified copies: *Lyon v. Bolling*, 14 Ala. 753; 48 Am. Dec. 122, and note.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

JONES v. MEYERS.

[2 IDAHO, 72C.]

PRE-EMPTION-CERTIFICATE OF FINAL PAYMENT, POWER OF LAND OFFICE TO CANCEL.—The land office of the United States has the power to cancel all entries of public lands at any time before a patent issues thereon, on proof that the entryman has failed to comply with the law and has procured his final receipt or certificate on false evidence.

PRE-EMPTION CLAIMANT, RIGHTS OF PURCHASER FROM.—UNTIL A PATENT ISSUES the rule of *caveat emptor* applies with peculiar force to purchasers of land from pre-emption entrymen. Therefore, after such purchase, the title of the purchaser may be destroyed by the canceling by the land office of the certificate of final proof and payment, upon a hearing at which it is shown that such certificate was procured by false testimony respecting the residence of the pre-emptor on the land.

Smith and Smith, for the appellant.

R. S. Spence, and Hawley and Reeves, for the respondent.

SULLIVAN, C. J. This is an action in ejectment, brought by the plaintiff against the defendant, to recover possession of certain real estate situated in the county of Bear Lake, in this state. The complaint is the ordinary one in an action of ejectment. The answer is a general denial of the allegations of the complaint, and sets up that defendant is in possession of said land under a homestead entry. The pleadings are not verified. The case was heard in the court below upon the following stipulation of facts: "In the above cause it is stipulated and agreed that the facts are as follows: That about the month of August, 1884, Lauritz Neilson made pre-emption declaratory statement No. 1362, embracing the land in controversy in this cause, and on the first day of October, 1885, made his

pre-emption entry and final proof for the land embraced in his declatory statement, being the lands in controversy in this case and in the case of *Sorrenson v. Meyers*, 2 Idaho, 802. That he, on that day, purchased said land, and paid two hundred dollars therefor, and took patent certificate for the same. That on the twenty-eighth day of October, 1886, said Lauritz S. Neilson, together with his wife, Catharine Neilson, by deed of conveyance duly executed and recorded, conveyed the lands described in the complaint to the plaintiff, Thomas W. Jones. That said Thomas W. Jones has never conveyed any of said land to any other person. That said conveyance to Thomas W. Jones was made in consideration of the sum of two hundred dollars which had been paid in the month of June or July, 1886. That said purchase was made in good faith by said purchaser on June 7, 1886. That the defendant filed an affidavit in the United States land office at Oxford, Idaho, charging that Lauritz S. Neilson had failed to comply with the requirements of the pre-emption law in the matter of residence and improvement of said land, previous to his final proof and payment therefor. That Neilson was notified by the officers of the United States land office that a day had been set for hearing, to determine the question as to whether his final entry should be canceled on account of the fraud charged. That Neilson ignored this notice, and did not endeavor to resist such cancellation, if it could be made. That the defendant appeared at the time appointed, August 10, 1886, and offered his evidence; and that afterwards, on the twenty-fourth day of January, 1887, an order was made by the officers of the land department of the United States, canceling the final entry of Lauritz S. Neilson; and thereafter, on the twenty-fifth day of January, 1887, the defendant, Emil Meyers, made homestead entry upon said land, which was accepted by the land department of the United States, and the proper certificate issued. That the defendant, Emil Meyers, took possession of the land mentioned in the complaint on the twentieth day of January, 1887, and has ever since had possession of the same. That a reasonable rent for the premises described in the complaint during the time the defendant has been in possession is one hundred and fifty dollars. That the damage to the plaintiff, being ejected from the land, is one dollar; and it is agreed, in case the plaintiff recover in this case, that he shall recover one dollar damages for the taking of the place by the defendant, and one

hundred and fifty dollars damages for rent during the time he has been excluded therefrom by the defendant. It is further agreed that said Neilson had not resided upon the said land six months prior to his making said final proof, and did not reside upon the land at the time he made said proof."

It is admitted that Lauritz S. Neilson, the grantor of plaintiff, entered the land in question under and by virtue of the pre-emption laws of the United States, and that at the time he made his final proof and received his final receipt or certificate from the receiver he had not resided upon said land six months, and did not reside thereon at the time of making said final proof. It is conceded by appellant that the final certificate was procured illegally and fraudulently, but appellant contends that the land department of the United States has no authority to cancel an entry where final certificate has been issued, and the land described therein sold to such a purchaser as the stipulation of facts shows appellant to be. It is admitted that respondent entered a contest to set aside Neilson's entry in June, 1886. It is also admitted that appellant purchased the land in question from Neilson in June, 1886, and paid him therefor in June or July, 1886, but that said Neilson did not execute a deed of conveyance conveying said land to the appellant until October 28, 1886. Neilson was duly notified that said contest was set for hearing August 10, 1886, but failed to appear and defend. The respondent in this cause introduced his testimony at said hearing, and thereafter said entry was canceled by the proper officer of the land department. The question, then, is, had the land department, under the facts of this case, the authority to cancel said entry? The secretary of the interior is given by law the entire supervision of the survey and the sale of the public lands. The commissioner of the general land office is by law required to perform, under the directions of the secretary of the interior, all executive duties appertaining to the survey and sale of the public lands of the United States. The registers and receivers are but local officers of the several land districts, charged with the performance of certain duties, and subject to the direction and supervision of the commissioner of the general land office and secretary of the interior. From the organization of the land department of the United States down to the present time it has been held by that department (and by the supreme courts of numerous states and territories) that it had the right and authority to cancel all entries of

public lands upon a proper showing, made prior to the issuance of a patent, if the entrymen had failed to comply with the law, and had procured final receipt or certificate upon false proof. *In re Cogswell*, 3 Dec. Dep. Int. 23, and authorities there cited; *Hosmer v. Wallace*, 47 Cal. 461; *Figg v. Hensley*, 52 Cal. 299; *Hestres v. Brennan*, 50 Cal. 211; *Vance v. Kohlberg*, 50 Cal. 346; *Randall v. Edert*, 7 Minn. 450; *Gray v. Stockton*, 8 Minn. 529; *Judd v. Randall*, 36 Minn. 12; *Bellows v. Todd*, 34 Iowa, 18; *McLane v. Bovee*, 35 Wis. 27; *Franklin v. Kelley*, 2 Neb. 79; *Hays v. Parker*, 2 Wash. (Ter.) 198. We have examined the cases cited by counsel for appellant and many other cases not cited, and with the exception of *Smith v. Ewing*, 23 Fed. Rep. 741, have been unable to find any case that sustains the view taken by appellant. The decided weight of authority is clearly against the position contended for by appellant. The appellant cites *Cornelius v. Kessel*, 58 Wis. 237, as holding that the commission had no power to cancel a final certificate. The court says: "The land was then subject to entry. It was purchased by him, and paid for. There was no fraud or mistake in the transaction." In the case at bar it is admitted that the entryman had not complied with the law; that he had not resided upon the land six months, and was not residing there at the time he made his final proof. The case at bar differs from the one last above cited in this, in that case there was no mistake or fraud; in this, there appears to have been perjury committed in making the final proof, and by such perjury a fraud was committed upon the land department. The appellant also cites *United States v. Minor*, 114 U. S. 233, as an authority in this case. It was held in that case that where the land department had issued a patent upon false and perjured affidavits, the United States is not precluded from instituting a suit in equity to cancel such patent. It does not conflict with former decisions of said court, in which it has been held that the decisions of the land department upon questions of fact and mixed law and fact are conclusive.

Appellant contends that the supreme court of the United States, in *Myers v. Croft*, 13 Wall. 291, holds that a sale by a pre-emptor, after entry and final proof and the issue of a final certificate to a *bona fide* purchaser for a valuable consideration, conveys to the purchaser a valid, legal title. The court in that case in no respect intimates that the grantee of a pre-emptor would get any better title than his grantor had,

or that any title would pass if the grantor had not, in good faith and in full compliance with the requirements of the pre-emption law, entered the land conveyed. The concluding portion of said opinion indicates very strongly the contrary opinion. The court says: "If it had been the purpose of Congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after entry, if at that time he was in good faith the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject": *Myers v. Croft*, 13 Wall. 297. It will not be contended for a moment that Neilson, appellant's grantor, was in good faith the owner of the land in question when he sold the same to the appellant. The case of *Carrol v. Safford*, 8 How. 441, cited by appellant, proceeds upon the theory that the government has no right to refuse a patent to a *bona fide* purchaser of land offered for sale. The court says: "But where there has been fraud or mistake the patent may be withheld, and every other purchaser at tax sale incurs the risk as to the validity of the title he purchases." The case of *Brill v. Stiles*, 35 Ill. 309, 85 Am. Dec. 364, is cited by the appellant as holding that the commissioner has no power to cancel the final certificate, and that his doing so is void. The court says: "If the entry was authorized by law the title passed to him, subject to be defeated by the proof of a right of pre-emption, and if unauthorized, he acquired no title. But until it was shown to have been illegally made, or to have been defeated by proof of a pre-emption, the certificate of purchase was evidence of an equitable title. There may be some apparent conflict in the Illinois decisions, but in the case of *Robbins v. Bunn*, 54 Ill. 48, 5 Am. Rep. 75, the court has clearly shown that there is no conflict in the decisions of that state upon this question. The court says, after citing *Brill v. Stiles*, 35 Ill. 309, 85 Am. Dec. 364, and other decisions: "These two classes of cases may seem at first inconsistent with each other, and there are probably some expressions in the various opinions not strictly harmonious, but on further consideration it will be seen there is no real antagonism in the decisions. The cases in the first class relate to pre-emption claims upon which the land offices have decided. The pre-emption law of

1830 required proof of the facts upon which the right of pre-emption depended to be made to the satisfaction of the register and receiver, agreeably to rules to be prescribed by the commissioner of the general land office. This, by implication, gave them the right to decide all cases of contested pre-emption, so far as they depended upon the facts of prior settlement; and this construction has been uniformly given to the law, as will be seen by the cases before cited and in other authorities quoted in the opinions pronounced in these cases. The finding of the land officers upon the facts in matters of pre-emption has been held conclusive by the courts upon the familiar ground that such officers, in these proceedings, were acting in a *quasi* judicial capacity, and within the scope of their authority. But on the other hand, when these officers have undertaken to cancel a patent or a certificate of entry for which a purchaser has paid his money, either at their discretion or under some patented regulation of the department which the law did not authorize, or under some clearly erroneous construction of the law of Congress, the courts have held themselves not bound by such acts of the officers of the land department, because they were not exercising a judicial function within the limits prescribed by law. The cases cited by counsel for defendant will be found to relate to proceedings of this character. Between those two classes of authorities there is a clear and sound distinction. In the one, the proceedings of the land officers are held conclusive because judicial in their character and within their conceded jurisdiction; in the other, such proceedings are held not conclusive because they are either ministerial in their character or, if judicial, beyond the authority given by the acts of Congress." In *Stark v. Starrs*, 6 Wall. 402, it is claimed that the supreme court of the United States holds that "a right to a patent, once vested, is treated by the government when dealing with the public lands as equivalent to a patent issue." This case arose under what is known as the "Oregon Donation Act," and under that act the right of the claimant to a patent became perfected when the certificate of the surveyor-general and accompanying proof were received by the commissioner of the general land office and he found no valid objection thereto. In that case the law had been fully complied with by the claimant, but the commissioner objected to issuing the patent to Stark upon the ground that the land was brought under the operation of the "townsite act," and was not sub-

ject to disposition under said "donation act." If the "donation act" of 1850 was applicable to the lands, Stark's right to a patent became perfect when the certificate of the surveyor-general and accompanying proof showed, in the judgment of the commissioner, a compliance with its requirements. In that case the commissioner's objection to the issuance of a patent arose, not from any defect in the certificate or proof, but from an opinion that the lands were subject to the provisions of the "townsite act" of 1844. How very different from the case at bar! The appellant's grantor had not complied with the requirements of the pre-emption law. Through false proof he had obtained a final certificate. A hearing was ordered long before the appellant received a deed of conveyance from his grantor, and had the appellant examined the records of the land office at Oxford, Idaho, he would have found a contest pending to set aside his grantor's entry at least four months before said deed of conveyance was executed. If an entryman can, through false proof, pre-empt land, and, as soon as he obtains his final certificate, sell the same and convey a valid title, it seems to us that it would "open wide the door to frauds innumerable and to an extent almost incalculable." Until the patent issues we think that the rule *caveat emptor* applies with peculiar force to purchasers of lands from pre-emption entrymen.

Chief Justice Tripp of Dakota, in the case of *United States v. Edward H. Dudley*, 1887, rendered an exhaustive opinion as to the authority of the land department to cancel a final certificate issued to a pre-emptor, in which he reviews and comments upon numerous decisions of the supreme court of the United States and decisions of the highest courts of many of the states and territories, and arrives at the following conclusions, to wit: "I am clearly of the opinion that the supervisory and appellate powers vested in the secretary of the interior, and the commissioner of the general land office, under his direction, gives them the right to examine all acts of the register and receiver. In matters of fact left to the determination of the local officers, the jurisdiction of the secretary and commissioner may be exercised by appeal and a re-examination of the facts themselves, or by examination of their action, and requiring them again to examine the questions of fact involved, and in all cases to supervise the purely administrative or executive acts of the local officers." The power of supervision given the secretary and commissioner is a gen-

eral one over all the acts of the register and receiver. There is no exception made in the matter of the issuing of final certificates; and, if the position here contended for be the correct one, to wit, that the commissioner must issue a patent at once upon the presentation of the certificate, and that issue of the certificate would conclude all inquiry into matters settled by its issue, then it would conclude all supervision by the superior officers; and on that reasoning the patent might as well issue by the local as by the supervisory officers. I am led to adopt the contrary of this reasoning. Besides, any other view would lead to hopeless conflict between the department and the courts. Our calendars would be crowded with land contests, and the action of the department would be indefinitely postponed. The only true doctrine, in my opinion, is that announced by the supreme court—that the jurisdiction of the court commences when that of the department ceases; and that until the patent issues, and while the matter is still pending before the department, the question is not one of private right upon which the courts have power to act. We are of the opinion that if a pre-emptor has not complied with the law, and procures a final certificate through fraud or perjury, a purchaser from him gets no better title than such pre-emptor obtained, and, if such fraud or failure to comply with the law is established to the satisfaction of the land department, under its rules and regulations, before patent has been issued, the land department has the authority to cancel such certificate. *In re Cogswell*, 3 Dec. Dep. Int. 23, and authorities there cited. Those decisions which hold that a final certificate is equivalent to a patent issued proceed upon the theory that the pre-emptor has complied with the law as to residence and improvement and all other requirements, and that such certificate was not procured through fraud or perjury. The judgment of the court below is affirmed, with costs.

HUSTON and MORGAN, JJ., concur.

PRE-EMPTION CERTIFICATES, CANCELLATION OF.—The commissioner of the general land office has the power to cancel a certificate of entry and purchase issued by the register and receiver, where the land is not subject to pre-emption: *Guidry v. Woods*, 19 La. 334; 36 Am. Dec. 677, and note. The validity of a certificate of pre-emption may be impeached by evidence of fraud and collusion between the pre-emptor and the officers granting the certificate: *Jamison v. Beaubien*, 3 Scam. 113; 36 Am. Dec. 534, and notes. A certificate of purchase is not a bar to inquiry as to the rights of the person

to whom it was issued: *Taylor v. Weston*, 77 Cal. 534; *Davidson v. Cucamonga etc. Land Co.*, 78 Cal. 4.

PUBLIC LANDS—SALE BEFORE PATENT ISSUED.—A contract to sell lands taken up under the homestead laws, before final proof, is invalid: *Moffatt v. Babson*, 96 Cal. 106; 31 Am. St. Rep. 192, and especially note. See notes to *Tyler v. Green*, 87 Am. Dec. 133; and *Henry v. Welch*, 23 Am. Dec. 492.

DURANT v. COMEGYS.

[2 IDAHO, 309.]

AN APPEAL FROM A JUDGMENT cannot be taken until it is entered.

A JUDGMENT IS RENDERED when ordered by the court, but is not entered until actually written in the judgment book.

JUDGMENT, FINAL, WHAT IS NOT.—The words, "at this day the court ordered this cause dismissed, at plaintiff's costs, taxed at three dollars and forty cents," do not constitute a final judgment, but merely an order directing the entry of a judgment of dismissal.

AN OBJECTION TO THE JURISDICTION OF AN APPELLATE COURT may be made at any time, and though not interposed by counsel should be considered by the court if apparent from the record.

On March 11, 1891, by direction of the court, an entry was made as follows: "At this day, on motion of defendant's counsel, the court ordered this cause dismissed at plaintiff's costs, taxed at three dollars and forty cents." Thereupon plaintiff appealed.

W. T. Stoll, and McBride and Allen, for the appellants.

Woods and Heyburn, for the respondents.

MORGAN, J. The first question to be considered is, Is this a judgment from which an appeal can be taken? If there is no judgment no appeal can be taken, and this court has no jurisdiction: *Gray v. Cederholm*, 2 Idaho, 41; *Meysan v. Chabrie* (Cal., July, 1885), 7 Pac. Rep. 634; *Stebbins v. Savage*, 5 Mont. 253. Section 4807, Revised Statutes of Idaho, is as follows: "An appeal may be taken to the supreme court from a district court, first, from a final judgment in an action or special proceeding commenced in the court in which the same is rendered within one year after the entry of judgment." In *McLaughlin v. Doherty*, 54 Cal. 519, the court states as follows: "Section 939 of the Code of Civil Procedure provides that an appeal may be taken from the final judgment within one year after the entry of judgment." It will be noticed that the wording is the same as our own statute. In *Gray v. Palmer*, 28 Cal. 416, this provision of the practice act was be-

fore the court for construction, and the court in its opinion defined with precision the distinction between the rendition and entry of a final judgment within the meaning of that act. The distinction which the court made was that a judgment is rendered when ordered by the court, and entered when actually entered in the judgment book: See also *Trenouth v. Farrington*, 54 Cal. 273. In the case of *McNevin v. McNevin* (Cal. Feb., 1883), 11 P. C. L. J. 92, the journal entry was in the following language: "Ordered that plaintiff's prayer for a decree of divorce be denied, and that defendant have judgment for costs." The court held this to be an order for judgment only, and dismissed the appeal. The same was held in the case of *Thomas v. Anderson*, 55 Cal. 43. Both these cases were approved in *Schroder v. Schmidt*, 71 Cal. 399; also in *Tyrrell v. Baldwin*, 72 Cal. 192; *Kimple v. Conway*, 69 Cal. 71. Section 4454 of our statute requires the clerk to keep a judgment book, in which judgments must be entered. Section 4456 requires him immediately after entering the judgment to attach together and file certain papers, which shall constitute the judgment roll. It is from the judgment so entered in the judgment book that an appeal must be taken, and not from the order of the court directing such judgment. The language used in this case and recorded in the journal was simply an order directing the entry of judgment of dismissal and for costs: Black on Judgments, secs. 110, 115; Hayne on New Trials and Appeals, 183, note 6. It is but just to the eminent counsel engaged in this cause to say that this conclusion was arrived at before the supplemental briefs were filed. Since they were filed the case cited by counsel for appellants has been examined, but has not changed the opinion of the court. In our opinion, an objection to the jurisdiction may be made at any time. If not made at all by counsel, and it appeared in the record, the court would be obliged to take notice of it. Appeal dismissed, without prejudice to another appeal; costs of appeal awarded to respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

JUDGMENT—WHEN RENDERED.—A judgment is rendered at the time the court pronounces the decision: *Estate of Cook*, 77 Cal. 220; 11 Am. St. Rep. 267, and note discussing the rendition and entry of judgments.

APPEAL—JUDGMENTS FROM WHICH APPEAL WILL LIE.—Judgments or orders from which an appeal will lie are those which terminate the action or

operate to divest some right in such a manner as to put it out of the power of the court making the order to place the parties in their original condition after the expiration of the term: *Harrison v. Lebanon Water Works*, 91 Ky. 255; 34 Am. St. Rep. 180, and note with cases illustrating the above rule; *Davis v. Davis*, 52 Ark. 224; 20 Am. St. Rep. 170, and especially the note; note to *Arnold v. Sinclair*, 28 Am. St. Rep. 494; extended note to *Williams v. Field*, 60 Am. Dec. 427.

JURISDICTION—OBJECTION TO—WHEN TAKEN.—An objection for want of jurisdiction, if it exists, may be raised by answer, or at any subsequent stage of the proceedings: *Godfrey v. Godfrey*, 17 Ind. 6; 79 Am. Dec. 448. It is always competent to inquire into the jurisdiction of a court: *Doe v. Tupper*, 4 Smedes & M. 261; 43 Am. Dec. 483; See *Green v. Creighton*, 10 Smedes & M. 159; 48 Am. Dec. 742.

WRIGHT v. WESTHEIMER.

[2 IDAHO, 902.]

AN ATTACHMENT IS NOT PRESUMED TO HAVE BEEN ABANDONED from the fact that the writ under which it was levied was directed to be returned and a new writ issued under which a second levy was made on the same property.

A HOMESTEAD PURCHASED WITH THE PROCEEDS OF A SALE OF ANOTHER HOMESTEAD is not exempt from attachment levied thereon prior to the filing of a declaration of homestead.

HOMESTEAD.—THE PROCEEDS OF A VOLUNTARY SALE of a homestead are not exempt from execution until they are invested in another homestead, nor is land purchased with such profits and intended for occupancy as a homestead, but upon which the debtor does not reside and with respect to which he has not filed any declaration of homestead.

Hawley and Reeves, and M. G. Cage, for the appellant.

T. M. Stewart, for the respondents.

SULLIVAN, C. J. This is an action brought by the appellant for the purpose of quieting title to and removing cloud from the title of certain town lots in the town of Blackfoot, Bingham county. The complaint alleges that the respondents (the defendants in the court below) commenced an action in the district court of Bingham county, Idaho, against this appellant, on the twenty-first day of November, 1890, to obtain judgment against appellant, on a certain contract theretofore executed by the appellant, and on said twenty-first day of November caused a writ of attachment to issue out of said court in said cause, and placed the same in the hands of the sheriff of said Bingham county for service; that on said date the sheriff levied said writ of attachment upon lots 12, 13,

14, 15, 16, 17, and 18, in block 55, in the town of Blackfoot, said county; that on the second day of December, 1890, said defendants abandoned said levy under said writ, and caused another writ of attachment to issue in said action, and that no affidavit or undertaking was made or given before the issuance of said last-mentioned writ; that said writ was irregularly issued and void; that said writ was levied by the said sheriff on the lots above described; thereafter the sheriff made his return thereon to the court, and also to the recorder of said Bingham county; and that each of the returns, so made by the sheriff, is a part of the records of said county, and appear on said records to be regular on their face; and that said returns and records cast a cloud on the title of the plaintiff. The complaint further alleges that plaintiff is a married man, and the head of a family; that his family resides with him upon said lots as their home, and that he has no other residence or home; that on said twenty-first day of November, and at all times since said date, the said lots, and the dwelling-house thereon situated, were and are exempt from the claim of defendants; that said property was the homestead of plaintiff, and was not subject to the payment of his debts; and prays that his title to said property be quieted and that the cloud cast thereon by the levy and return of said writs be removed. The answer specifically denies all of the allegations of the complaint, except the copartnership of plaintiffs; the bringing of the suit mentioned; the issuance, levy, and return of the writ of attachment; and avers that, as appellant had come "into more open and notorious assertion of rights and ownership in and to said real estate, the respondents cause a second writ of attachment to issue," and to be levied upon said real estate; and avers that on the thirty-first day of January, 1891, respondents obtained judgment against the plaintiff for three hundred and fifty-nine dollars and nineteen cents damages, and costs taxed at nineteen dollars and sixty-five cents in the action in which said writs of attachment were issued, and claim a lien therefor on said lots and premises. The cause was tried by the court without a jury, and judgment rendered dismissing the action, with costs against the plaintiff. Thereupon a motion for a new trial was interposed, and overruled by the court. From the order overruling said motion the case is brought to this court.

The first error specified by the appellant is that the court

erred in holding that the writ of attachment issued in the suit of respondents against appellant, and levied upon the real estate and premises above described, was valid, and created a lien on said premises. This specification of error does not specify which of said writs of attachment is referred to, but as the record shows that the court below held that the levy of the first writ created a valid lien upon said premises, we presume that that is the writ referred to. We will, however, determine whether said objection or specification of error is fatal to either writ. The appellant alleges in the complaint that the levy of the first writ was abandoned by reason of the issuance of the second writ, and levying it upon the identical property on which the first writ was levied, and that the second writ was invalid by reason of respondents having failed to file an affidavit and undertaking prior to the issuance thereof. The objection to the last writ is, however, not urged in this court. The respondents, by their answer, deny the abandonment of the levy of the first writ, and state in their answer the reason for procuring the issuance of the second writ, as follows: "The said plaintiff having at that time come into more open and notorious assertion of rights and ownership in the said real estate, the defendants herein caused a new writ to issue, as provided by law, and procured the same to be levied on all the interest the said D. D. Wright then had in said real estate." The abandonment of the first writ was made an issue by the pleadings, the burden resting on the plaintiff. The record contains no evidence of abandonment. It is, however, contended that the abandonment was established by the issuance of the second writ, and the levying of the same upon the identical parcel of land on which the first writ had been levied. The answer to this is that the respondents denied any intention of abandoning the lien secured by the first writ, and avers that they procured the issuance of the second writ as a precautionary measure only. The law does not presume or favor abandonments. The issuance having been made by the pleadings, it was incumbent upon the appellant to establish the fact of abandonment, which he failed to do.

The appellant also contends that, under the levy of the first writ of attachment, no lien was created upon said property, for the reason that the law requires the sheriff, after he has made a levy by attachment, to file in the office of the county recorder a notice describing the property levied upon and at-

tached, duly signed by him; and urges that the notice so filed by the sheriff, under and by virtue of said levy, was not so signed. This question was not raised in the court below, and we cannot, for that reason, consider it here; besides, the appellant is estopped by the allegations of the complaint from now denying that the notice so filed in the recorder's office was not signed by the sheriff, and regular on its face. Appellant, after alleging that said writ was duly issued on November 21, 1890, and duly levied upon said property, further alleges as follows: "And made his return thereon to the court, and also to the recorder of Bingham county; each of the returns so made by the said sheriff is a part of the records of Bingham county and of this court, and each of said returns and the records made thereunder by the said sheriff appear on the records to be regular on their face, and that said returns and records cast a cloud on plaintiff's title." This averment is plain and direct, and avers that said return so so filed in the office of the county recorder is regular on its face. Parties will not be permitted to urge points in this court which were not raised in the court below, especially when such contentions or points are flatly contradicted by the averments of the pleadings of such party. If a mistake had been made in the pleadings, they should have been amended in the court below. Parties will not be permitted to contradict their sworn pleading in that manner. This disposes of the first specification of error as applied to the first writ.

As applied to the second writ, the record shows that the appellant, at the time of the levy of said writ, was residing upon said premises with his family, and had, prior to such levy, executed and filed his declaration of homestead, as provided by sections 3071 and 3072 of the Revised Statutes of Idaho, claiming said premises as a homestead. Said premises were exempt from attachment and execution, after filing said declaration of homestead: Rev. Stats., sec. 3038. The respondents acquired no lien upon said premises by reason of the levy under said second writ: Rev. Stats., sec. 3039.

The third and fourth specifications of error will be considered together, and are as follows: 3. "The court erred in failing to find that said property was exempt from execution and attachment, and was not subject to the debt sued on by Westheimer and Sons against the plaintiff." 4. "The court erred in failing to hold that the property in dispute in this

action was exempt from seizure, levy, and sale under execution and attachment, because of the fact that plaintiff procured the money to purchase this property from the sale of property on which he had a valid homestead exemption under the laws of the state of Idaho." The contention is, that as the property attached had been purchased with the proceeds of the sale of the homestead of appellant, and that as appellant purchased said property as a home for himself and family and filed his homestead declaration therefor as soon as he had established his residence thereon, the same is exempt under the homestead laws. The question for consideration then is, Under the homestead laws of the state of Idaho, can a person sell his homestead, which is exempt from execution and forced sale, and purchase another home with the proceeds thereof, and hold the same, exempt from execution and attachment, without filing in the proper county recorder's office the declaration of homestead required by section 3071 of the Revised Statutes of Idaho? The evidence contained in the record establishes the following facts: That the appellant, with his family, consisting of a wife and eight small children, was residing in the town of Blackfoot, Bingham county; that he was the owner of the home in which he was then residing; that he had filed in the proper recorder's office his declaration of homestead, claiming the said property as a homestead, and that the same was exempt from execution and forced sale; that being indebted to divers persons, he concluded to sell said homestead, purchase another of less value, and pay certain of his creditors with the surplus. He thereupon sold his homestead, paid part of his debts, and invested one thousand dollars of the proceeds of the sale of said homestead in the lots and premises in question, for the purpose of making a home for himself and family. He removed his family there about December 3 or 4, 1890, and filed his homestead declaration therefor on December 4, 1890; that appellant filed his homestead declaration after the levy of the attachment, on November 21, 1890, and before the levy of the second writ of attachment, December 5, 1890.

The second writ of attachment is not a lien upon said homestead, because the homestead declaration was filed prior to the levy of said writ: Revised Statutes, Idaho, sec. 3039. The writ of attachment, levied upon said premises on November 21, 1890, is a valid lien thereon, unless the fact of its having been purchased with a part of the proceeds arising from the

sale of the former homestead of appellant exempts it from such lien. Section 3070, Revised Statutes, Idaho, is as follows: "In order to select a homestead, the husband or the head of the family, or, in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as conveyance of real estate is acknowledged, a declaration of homestead, and file the same for record." Section 3071 provides what such declaration must contain. Section 3072 provides that such declaration must be recorded in the office of the recorder of the county in which the land is situated. Section 3073 provides that after the filing of the declaration for record the premises therein described constitute a homestead. Section 3038 provides that the homestead is exempt from execution and forced sale, except as provided in title 7 of the Revised Statutes. Section 3039 provides that the homestead is subject to execution or forced sale in satisfaction of judgments obtained for certain debts and encumbrances, and, among others, in an action in which an attachment was levied upon the premises before the filing of the declaration of homestead. This provision applies to the case at bar, unless it is excepted for the reason of its having been purchased with the proceeds of the former homestead. The writ of attachment was levied November 21, 1890; the homestead declaration was filed December 4, 1890. Section 3041 provides that a homestead can be abandoned only by a declaration of abandonment or a grant or conveyance thereof, executed and acknowledged by the husband and wife, if the claimant is married, and by the claimant, if unmarried. From the above provisions it will be observed that to select a homestead in this state under the homestead law, certain things must be done and performed before it is a homestead or is exempt from execution and forced sale, and that after a homestead has been once acquired it can be abandoned only as the statute prescribes. The appellant, in this case, abandoned his first homestead by selling and conveying it to one C. S. Smith. There is no provision in the statutes of Idaho exempting the money for which a homestead may be sold from execution or attachment until it may be invested in another homestead, except in cases of involuntary sales, which provision is not applicable to this case. Our statutes are silent upon the question under consideration. They contain no provisions for an exchange of one homestead for another, nor the purchase of another with the proceeds of

the sale of the one exempt, nor for the exemption of the new homestead so purchased.

It is contended that the homestead and exemption statutes should be liberally construed. We concede this proposition. Section 4 of the Revised Statutes declares, among other things: "The statutes of this state, and all proceedings under them, must be liberally construed, with a view to effect their objects and to promote justice." Aside from this provision we can hardly conceive the necessity or propriety of strictly construing a statute of mercy or benevolence. But, as our statutes are silent upon the question under consideration, this court will not undertake to supply omissions made by the law-making power. This court must distinguish between enacting laws and construing them. Through motives of humanity towards the debtor and his family exemption and homestead laws have been enacted. Prior to their enactment the law was as cruel as Shylock to the unfortunate debtor, and his wife and children had to suffer. It may be truthfully urged that they sometimes assist unprincipled men to consummate the most cruel frauds. However, in the vast majority of cases their operation is beneficial and humane. They assure to a family a home. "They mitigate the harshness of the cruel, grasping creditor, and give to the unfortunate debtor a place of refuge and a gleam of hope." We are of the opinion that an amendment of our homestead laws exempting the proceeds from a voluntary sale for a reasonable time would be in the interest of humanity. For, however much such an amendment may be desired, this court will not assume the power to amend the statutes, and thus usurp the legislative functions of a co-ordinate branch of our state government. The statutes of some of the states permit the exchange of one homestead for another, and the sale of one, and with the proceeds thereof the purchase of another, and hold the latter exempt from attachment and execution; but states having such statutes do not require the making and filing of a homestead declaration as a precedent condition to the procurement of a homestead, and its exemption from attachment and execution. We are of the opinion that, under our statutes, a residence purchased with the proceeds of the sale of a former homestead, which was exempt from attachment and execution, does not for that reason become a homestead, and exempt from attachment and execution under our homestead laws. The required homestead declaration must

be filed in order to secure the benefit of the exemption laws. The judgment of the court below should be affirmed, and the respondents are entitled to judgment against the appellant for their costs on this appeal, and it is so ordered.

HUSTON and MORGAN, JJ., concur.

EXECUTION—LEVY—ABANDONMENT OF.—A constable's levy is not abandoned merely because he gives his execution to a sheriff, who makes a subsequent levy, subject to that made by the constable on the same goods, and sells them: *Miller v. Gets*, 135 Pa. St. 558; 20 Am. St. Rep. 887. For a discussion of the continuance of an attachment, what possession and control is necessary to, see *Shephard v. Butterfield*, 4 Cush. 425; 50 Am. Dec. 796, and especially note.

HOMESTEADS—PROCEEDS OF VOLUNTARY SALE OF, WHETHER EXEMPT FROM EXECUTION: See *Dalton v. Webb*, 83 Iowa, 478; 32 Am. St. Rep. 314, and note.

McDONALD v. BURKE.

[2 IDAHO, 995.]

COSTS, APPLICATION TO RETAX, NOT MADE WITHIN TIME.—Though a statute provides that a party dissatisfied with the costs claimed may, within three days after the filing of the bill of costs, file a motion to have the same retaxed by the court, the failure to file such motion within that time does not preclude the court from granting a motion made thereafter, if the statute does not require any notice to be given of the filing of the cost bill, and does authorize the court, within six months after the adjournment of the term, to relieve a party from any judgment, order, or other proceeding taken against him through his mistake, inadvertence, or excusable neglect.

COSTS.—THE FEES OR COMPENSATION OF EXPERTS employed by the prevailing party to make investigation and to testify at the trial are not allowable as costs against his adversary under a statute authorizing the including in a cost bill by the prevailing party "of the items of his costs and necessary disbursements in the action or proceeding."

F. Ganahl, and McBride and Allen, for the appellants.

Woods and Heyburn, for the respondents.

HUSTON, J. This is an appeal from an order of the district court for Shoshone county, made after judgment, taxing costs of defendants as the prevailing party in the suit. The action was brought under the provisions of section 2326, United States Statutes. Cause was tried before court with jury. Verdict and judgment for defendants. Judgment was entered on the thirteenth day of August, 1890. Cost bill filed August 16, 1890. No notice of filing of cost bill was

ever given to or served on plaintiffs or their attorneys. On February 24, 1891, plaintiffs made their motion for taxing of the costs in said action before the district court for said Shoshone county, which motion was granted, and thereupon said district court proceeded to tax the costs in said action, and from the defendants' memorandum of the items of costs and necessary disbursements struck out and disallowed the following items, viz: "Cost on appeal, paid M. E. Thompson, stenographer, for services in transcribing notes and testimony taken upon the trial, and necessarily incurred in the preparation of the papers on appeal, \$345.00; printer's bill for printing briefs for supreme court, reduced from \$105 to \$40, \$65.00; V. M. Clement, for services as surveyor, etc., \$1,000; E. T. Williams, assaying and testifying as an expert, \$250; Frank Dorey, examining ground, making assays, and testifying as an expert, \$500; John H. Hammond, for three trips to said mine, examining the same, and testifying as an expert, \$4,000; W. C. Miller, for services as surveyor on both trials, \$250." From the action of the district court in disallowing said items, the defendants appeal.

The first position of appellants in support of their appeal is that, they having filed their cost bill within the time prescribed by the statutes, to wit, "within five days after rendition of verdict or notice of the decision," and the plaintiffs having failed within the time fixed by statute, to wit, three days after the filing of the bill of costs, to file a motion to have the same taxed by the court, the court had no jurisdiction to tax the same thereafter. Section 4912, Revised Statutes, Idaho, provides that "a party dissatisfied with the costs claimed may, within three days after filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers." The statute does not provide for the giving of notice to the opposite party of the filing of cost bill. In this, we think, the law is defective. Does a failure by a party dissatisfied to file his motion to tax within three days after the filing of the cost bill deprive him of all remedy against an exorbitant cost bill? We think not. The remedy given by the provision of section 4912, above cited, is not exclusive. It is not mandatory. Under the provisions of sections 4229, Revised Statutes, Idaho, a party may at any time, not exceeding six months after the adjournment of the term, apply to the court or the judge thereof in vacation for relief from any judgment,

order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. It certainly would not be construing the statutes "with a view to effect their objects and to promote justice" (Revised Statutes, sec. 4) to hold that a party was remediless against an exorbitant cost bill, of the filing of which he had never had notice. But there is another view of this case, which is discussed at some length in the briefs of counsel, and that is: Were the items of costs disallowed by the district court properly chargeable as costs? All of the disallowed items, except that of three hundred and forty-five dollars for stenographer's services, and the reduction of sixty-five dollars from the charge for printing briefs were charges for the services of experts. It is contended by appellants that "the statute allows costs and necessary disbursements," but I have been unable to find any such provision in our statute. In section 4912, referring to the filing of the cost bill, the language used is: "A memorandum of the items of his costs and necessary disbursements in the action or proceeding." If this is the statutory provision upon which counsel rely to support their position, we cannot agree with them. Such a construction would allow the taxing as costs of any disbursements which the party or his attorney might deem necessary. Counsel fees, clerk hire, and any other expenditures necessarily made in the prosecution of the suit or proceeding, would, under such a view, be equally chargeable as costs." "In the absence of any statutory provision authorizing it, the compensation of experts, beyond the regular witness fees, is not a necessary disbursement, and cannot be taxed as a part of the costs. It is considered as having been incurred for the parties' own benefit, and is no more a disbursement in the cause than the fees paid to an attorney": Lawson's Expert Evidence, 270. In *Faulkner v. Hendy*, 79 Cal. 265, the court says: "If the services of an expert are necessary for the proper presentation and determination of the case, he should be appointed by and act under the direction of the court. Where, as in this case, he is the employee of one of the parties, the temptation to act in the interest of such party must be apparent. Therefore, in order to secure his fair and disinterested services, he should be appointed by the court, and not by either of the parties, and, if either party sees proper to employ the services of an expert for his own benefit, the court should not require the opposite party to pay for the services so rendered." This we believe

to be the correct rule. It does not appear from the record that the fees charged in the cost bill for the services of the stenographer, and disallowed by the court were rendered by the court stenographer, or incurred under the provisions of the statute in relation thereto (Laws 1st Session Legislature, State of Idaho, p. 234), and from the fact that they were disallowed by the court it is presumed they were not. The action of the district court is affirmed, with costs to respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

COSTS—ITEMS NOT RECOVERABLE AS.—The expenses of making surveys and plans, needed in preparing a case for trial, even where the plans were used on the trial, are not allowable in the bill of costs: *Ela v. Knox*, 46 N. H. 16; 88 Am. Dec. 179, and extended note at page 184, where the allowance of fees of experts in the cost bill is discussed. The fees of an expert for examining and reporting on an account are not proper items of a cost bill: *Rathbone v. Neal*, 4 La. Ann. 563; 50 Am. Dec. 579, nor are either witness or attorney fees in condemnation proceedings: *Hester v. Commissioners*, 84 Mich. 450; *St. Louis v. Meints*, 107 Mo. 611.

MURPHY v. MONTANDON.

[2 IDAHO, 1043.]

ATTACHMENT PROCURED BY FALSE AFFIDAVIT.—If an attachment is procured by plaintiff's filing an affidavit that the debt upon which he sues is not secured, and a bond is given to release property from a levy made under such attachment, the obligors in the bond may successfully resist the action against them thereon by establishing the falsity of such affidavit.

ACTION against sureties on an attachment bond. Judgment for plaintiff.

A. F. Montandon in pro. per.

Seldon B. Kinsbury, for the respondent.

MORGAN, J. John Murphy brought suit against Edwin S. Bartsch. To secure a lien upon property, the plaintiff therein procured an attachment, and levied upon the property of the defendant, Bartsch. To procure said attachment the plaintiff, Murphy, filed an affidavit, stating, among other things, "that the payment of the debt had not been secured by any mortgage lien or pledge on real or personal property." To release said attachment, the defendants in the present suit, A. F. Montandon and Ernest Cramer, on the tenth day of

August, 1887, gave their bond in the sum of twelve hundred and fifty dollars, conditioned to pay such judgment as the said Murphy should secure against said Bartsch. Upon giving this bond the attachment was released. In the trial of the principal cause judgment was given for the plaintiff, Murphy, against the defendant, Bartsch, for the sum of seven hundred and fifteen dollars damages and thirty-four dollars and twenty-five cents costs. Upon this judgment the sum of three hundred and seventy-nine dollars and seventy-five cents was paid, leaving the sum of four hundred and twelve dollars and forty cents still due. To recover this sum suit is brought upon the bond of Montandon and Cramer. Montandon only being served with process, judgment was rendered against him. Motion for new trial was made and overruled, and defendants appeal to this court.

On the trial of the principal cause the court made the following finding of fact, being the fourth: "That at the date of said note [being the note given by the defendant, Bartsch, to the plaintiff, Murphy] one T. B. Shaw was indebted to the defendant [Bartsch] on account for goods sold in the sum of five hundred and twenty-eight dollars and five cents, and, being so indebted, duly accepted an order drawn on him by the defendant [Bartsch] for the amount in favor of this plaintiff, and that the defendant, as collateral security, delivered the same to the plaintiff." This order was precisely the same as the draft drawn by Bartsch upon Shaw and accepted by him. It is a chose in action, an evidence of debt, and was, therefore, personal property, under section 16, subd. 3, Rev. Stats. Idaho, and was a pledge of personal property to secure the debt of Murphy. This pledge being placed in the hands of Murphy, the presumption is that it still remained in his hands as such security at the time he filed his affidavit for the attachment. This presumption should have been overcome by the statement in his affidavit "that said security has, without any act of plaintiff, become valueless." Without such statement, the affidavit must, under the finding of the court, be held to have been false. Without an affidavit in accordance with the statute, the court was without jurisdiction to issue the writ. Taking the affidavit to be true, it gave the court jurisdiction to issue the writ, but the finding of the court shows the affidavit to be false. Can a false affidavit give the court jurisdiction? Falsehood or fraud vitiates everything founded upon it. The writ was therefore in fact unlawfully issued. In *Mathews v.*

Densmore, 43 Mich. 461, the court says: "The first step in this jurisdiction is to show, not a writ merely, but a valid writ; and there can be no valid writ of attachment without a sufficient affidavit." We are aware that the supreme court of the United States reversed this case, *Mathews v. Densmore*, 109 U. S. 216, but that court simply held that a writ *prima facie* good, although issued upon an insufficient affidavit, would protect the officer in making the levy. The affidavit not being attached to the writ, the officer is not called upon to determine the validity of the same. This writ was procured by an insufficient affidavit or a false one. In either case it would be a perversion of justice to hold that the plaintiff could make two men responsible for a debt they did not owe, by either a false affidavit or an insufficient one, or that he could recover upon a bond which was given to procure the lease of a writ which was illegally and wrongfully procured. The respondent cites, in support of his contention, that the defendant cannot take advantage of this defective affidavit: *Smith v. Fargo*, 57 Cal. 157; *McMillan v. Dana*, 18 Cal. 339; *Pierce v. Whiting*, 63 Cal. 538. But these cases simply hold that the obligors in the bond cannot deny the recitals therein; that is, as in those cases, the defendants could not deny that the attachment was issued, that it was levied upon property of defendants, nor that the property was released, as these facts were all recited in the bond. The defendant in the case at bar is not seeking to deny any of these facts. These cases are therefore not in point. The issuance of the writ is authorized by the statute upon certain conditions. These conditions must be strictly complied with in order to give the court jurisdiction to issue the writ. If the writ is executed, the execution cannot possibly validate the illegal issue by giving jurisdiction of such retroactive character as to cure all that went before it, and contributed to the wrongful result: *Waples on Attachments*, 324. The issuance of the attachment being illegal, the creditor acquired no rights under it, and the bond was without consideration. The affidavit in the original action for the attachment was offered in evidence by the defendant, and, upon objection, was ruled out, to which ruling the defendant duly excepted. The court having found as a fact in the original suit that the plaintiff held, as security for the debt, a pledge of personal property, both this finding and the affidavit were proper evidence for the court to consider, as the affidavit, and that alone, gave the court jurisdiction to issue

the writ. The exclusion of the affidavit was therefore error. Judgment reversed, and new trial granted; costs awarded to defendant.

HUSTON, J., concurs. SULLIVAN, C. J., did not sit in the hearing of this case.

ON REHEARING.

(May 18, 1892.)

MORGAN, J. The plaintiff files motion for rehearing in this case, and cites, as an additional authority, *Harvey v. Foster*, 64 Cal. 296, in support of his contention that the obligors in the bond cannot be heard to plea that the attachment was issued upon a false or insufficient affidavit. In that case, however, there was no bond given for the release of the property from the lien of the attachment. The contention was between the attaching creditor and a mortgagee of the property levied on for the amount realized from the sale of the property in excess of the amount necessary to discharge the mortgage decree; the attaching creditor claiming it to satisfy his judgment, and the mortgagee, Kraft, claiming it to satisfy a promissory note which he held against the judgment debtor, defendant in the original suit. The cases are not parallel. There was no privity of interest between the attaching creditor and the mortgagee. The latter had no interest whatever in the original suit, and had no rights or obligations growing out of said suit, nor out of any of the proceedings connected therewith. In the case at bar the liability of the defendants Montandon and Cramer grew out of and were dependent upon the issuing of the attachment, and the validity of the attachment depended upon the fact that a true and sufficient affidavit in conformity with the statute had been placed on file. The lien acquired by attachment is an extraordinary remedy, and dependent wholly upon the statute, and the statute must be strictly, or at least substantially, complied with. The defendants, Montandon and Cramer, were not parties to the original suit, and could not appear therein, and move for a dissolution of the attachment. They have had no day in court. An attachment issued upon a false or fatally defective affidavit stands in the same position as an attachment issued without any affidavit; and can it be successfully contended that a bond executed to release property from the lien of an attachment issued without affidavit, and therefore without any jurisdiction, is supported by a valuable consideration? If the defendants in this suit cannot go back of the naked bond, then they cannot show that

their obligation is without any consideration; a position, it seems to us, contrary to the plainest principles of justice. The case of *Porter v. Pico*, 55 Cal. 173, is cited in *Harvey v. Foster*, 64 Cal. 296, in which the court say: "Any irregularities in obtaining the attachment were waived by the defendant to the suit when he appeared and answered, without taking advantage of them, by motion or otherwise, in the course of the proceedings." Waived by the defendants in the original suit it may be, but these defendants were not parties to this waiver. The original defendant, Bartsch, owed the debt to Murphy. The method adopted for collecting was not so material to him. These defendants did not owe the debt. The consideration for their promise, if any existed, was the release of the lien of the attachment, which in this case was invalid. In the discussion of this subject in *Wade on Attachments*, sec. 190, the following cases are referred to:

Barry v. Foyles, 1 Pet. 315. In this case the court say: After the defendant has appeared and [pleaded] answered, no reference can be made to the attachment proceedings, and the cause stands in court as if no attachment had been issued." This was not a suit upon the bond, and is therefore not in point.

Haggart v. Morgan, 5 N. Y. 422; 55 Am. Dec. 850. In this case the defendant was on the bond with his sureties, and the court held that when attachment was issued the defendant had the opportunity of contesting all proceedings to procure attachment. After answer he could not question the regularity of attachment proceedings.

In *Voorhees v. United States Bank*, 10 Pet. 473, land was sold and conveyed after judgment obtained by attachment proceedings. The court holds: "When ejectment was brought upon this title the original judgment is conclusively presumed to be regular, and cannot be questioned in this collateral proceeding." If defendant in the original action neglects the method pointed out by law to remedy errors (by appeal) he cannot do so in a collateral proceeding. This case is not similar to the case at bar.

Holding a contrary doctrine, we find, among others, the following cases: In *Homan v. Brinckerhoff*, 1 Denio, 184, attachment was issued upon giving a bond which in its conditions was faulty, and did not comply with the statute. Attachment was levied upon property. Bond was given to release the property. Suit was brought upon the bond, judg-

ment in original suit being given and not paid. Held, the justice, by reason of defective bond, did not acquire jurisdiction to issue the attachment. The court say: "The court obtained jurisdiction in the attachment suit when the defendant Davis appeared and pleaded to the declaration. Judgment was therefore valid. But that will not aid the plaintiff. He did not hold the property under the judgment, no execution having been levied upon it. Although the plaintiff had got a valid judgment, he had no other hold upon the property than such as the attachment gave him, and that was utterly void for want of jurisdiction to issue it." In *Whiley v. Sherman*, 3 Denio, 185, the above case is commented upon and approved as to above point; decision rendered in July, 1846. In December, 1846, in *Kanouse v. Dormedy*, 3 Denio, 569, the same court (N. Y. Ct. App.), in suit brought upon a bond given to release property levied upon by attachment, the court pass upon the question as to the validity of the bond. Affidavit for attachment was required to state nonresidence of defendant in attachment suit. Sureties on the bond appeared, and pleaded that defendant was a resident of the state of New York, and therefore that the affidavit for attachment was not true, and the attachment was issued without jurisdiction. The court, Walworth, Ch., held that the *onus* of proving that defendant was a resident of the state of New York when attachment was issued was upon the defendants, and not upon plaintiff; in effect holding that, if defendants had made this proof, the bond would have been without consideration and void. Wright, Senator, in his opinion in the same case, says: "In order to obtain the attachment it was necessary for the plaintiff to prove before the officer to whom the application was addressed, affirmatively and distinctly—1. That the debtor was a nonresident; 2. That the creditor was a resident, or, if he was a nonresident, that the demand arose upon a contract made within the state. And "suppose the attaching creditor should omit to state in his affidavit before the judge that his demand arose upon contract, judgment, or decree amounting to one hundred dollars, does any one believe that the proceedings under the attachment issued upon such an affidavit could be sustained for any purpose? The question of jurisdiction must always remain open to the debtor, and, if the officer had no jurisdiction, the whole proceeding was *coram non judice*. If it must always remain open, then it would be competent for the debtor to show upon the trial, as

a defense to the bond, by evidence, that the creditor was not a resident of the state, and therefore that the bond and all other proceedings in the matter were void as to him." These cases are precisely similar to the case at bar, and hold squarely to the position taken in this case in the original opinion. We are aware that there are quite a variety of decisions in the several states upon this question, but we think this holding is more in consonance with the spirit of justice, which should be the groundwork of all judicial proceedings. The appeal in this case was from the order denying the defendant a new trial. This court reverses that decision, and the order of the court should be and is that appellants have a new trial. With this change the rehearing is denied.

SULLIVAN, C. J., and HUSTON, J., concur.

ATTACHMENT—SURETIES ON UNDERTAKING BOND, LIABILITY OF.—In an action on an undertaking bond to recover the amount of a judgment against a defendant in attachment, the sureties on the bond are absolutely bound by such judgment, unless fraud, collusion, or mistake is shown: *Jaynes v. Platt*, 47 Ohio St. 262; 21 Am. St. Rep. 810; *Myers v. Smith*, 29 Ohio St. 120; *McAllister v. Eichengreen*, 34 Md. 54; *Inman v. Strattan*, 4 Bush, 445; *Coleman v. Bean*, 3 Keyes, 94; *Ferguson v. Glidewell*, 48 Ark. 195; *Nevin v. Fouché*, 77 Ga. 47. In *Bates v. Killian*, 17 S. C. 553, it was held that an attachment might be dissolved after the undertaking had been given, on the ground that the allegations on which the attachment was issued were untrue. That the sureties may defend on the ground that the attachment is void for want of jurisdiction of the subject matter was admitted in *Coleman v. Bean*, 3 Keyes, 94, the court referring to the cases of *Homan v. Brinckerhoff*, 1 Denio, 184, and *Decker v. Bryant*, 7 Barb. 182. The latter case cites *Matter of Hurd*, 9 Wend. 465, and *Matter of Faulkner*, 4 Hill, 598, in which it was held that the question of jurisdiction remained open to the debtor himself after the appointment of trustees.

ELLIOT v. HALL.

[2 IDAHO, 1142.]

FRAUDULENT TRANSFERS.—IF MONEY IS EXEMPT AS WAGES no disposition of it by its owner can operate as a fraud upon his creditors.

EXEMPTION LAWS, CONSTRUCTION OF.—The beneficial intention of the legislature in the enactment of exemption statutes must not be defeated by strained or technical constructions thereof.

EXEMPTION OF WAGES.—The fact that moneys due a debtor for wages have been collected for him by another at his request does not render them, though remaining in the hands of such collector, subject to execution against the person by whom they were earned.

Wyman and Wyman, for the appellant.

J. W. Badger, for the respondents.

HUSTON, J. The plaintiff was a miner in the employ of the Comfort Consolidated Mining Company. A judgment had been recovered against him in justice's court. Execution was issued thereon and levied upon a certain sum of money in the hands of one Trevitic. There is no question but that the money so levied upon was the wages of the plaintiff, earned within the thirty days next preceding the date of the levy. Trevitic had drawn the same from the company at the request of plaintiff and held it for him. Trevitic stated to the officer making the levy (J. N. Hall, the principal defendant) that plaintiff owed him nothing; that he simply drew the money for him as an accommodation, and held it subject to his call. On demand of the officer (Hall) holding the execution, Trevitic delivered the money so held by him to such officer. Plaintiff brings his action against the officer and his sureties for the recovery of the money, claiming the same as exempt from levy, under the provisions of subdivision 7 of section 4480 of the Revised Statutes of Idaho, which is as follows: "The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or levy of attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family residing in this territory (state), supported wholly or in part by his labor." The necessary affidavits were duly served by plaintiff establishing the facts required by the section of the statute referred to. Plaintiff recovered judgment in justice's court. Defendants appealed to district court, when the judgment of the justice's court was reversed, and judgment for costs was rendered for defendants, and from the judgment of the district court the plaintiff appeals to this court. There is nothing in the record showing the grounds upon which the district court based its decision and judgment. The case was heard by the district court upon a stipulation as to the evidence. It appears from the plaintiff's motion for a new trial that, while the district court held that the money levied upon by the officer by virtue of the execution was exempt as wages, under the provisions of the statute the plaintiff had deprived himself of the benefit of the statute by "commingling, or causing to be commingled, said wages, so as to lose their identity

as wages." This view seems to be acquiesced in by defendants. The only evidence of a "commingling" is the fact that Trevitic drew this money from the company for the accommodation of the plaintiff, and held the same for the plaintiff; that plaintiff was not indebted to Trevitic, nor had Trevitic any claim or lien upon the money so drawn.

It is insisted by respondents, 1. That the drawing of the money by Trevitic, upon the order or request of plaintiff, was a fraud upon the creditors of plaintiff; 2. That it was such a commingling of the money as deprived it of the exemption provided by the statute. The money being confessedly exempt as wages, its disposition by the plaintiff could not operate as a fraud upon defendants: Freeman on Executions, sec. 136; *Derby v. Weyrich*, 8 Neb. 174; 30 Am. Rep. 827; *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751; 3 Am. St. Rep. 290. The drawing of the money by Trevitic, and his holding it for the accommodation of the plaintiff, it not appearing that there were any dealings between plaintiff and Trevitic, or that Trevitic had or claimed to have any interest in or lien upon the money, could hardly be called a "commingling." Trevitic did not hold any other money or property of the plaintiff. Suppose plaintiff had given his wife or one of his children an order to draw his wages; would that have been a commingling? The object of the statute was to preserve, for the support of the debtor and his family, a portion of his earnings, and to the accomplishment of this end the statute should receive a liberal construction. The beneficent intention of the legislature must not be defeated by a strained or technical construction. This rule of construction seems to have been quite generally recognized in this class of cases: Freeman on Executions, sec. 208; *In re McManus*, 87 Cal. 292; 22 Am. St. Rep. 250; *Montague v. Richardson*, 24 Conn. 347; 63 Am. Dec. 173; *Kuntz v. Kinney*, 33 Wis. 514; *Kenyon v. Baker*, 16 Mich. 373; 97 Am. Dec. 158; *Bevan v. Hayden*, 18 Iowa, 122. The case of *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128, is cited by respondents in support of their contention that the wages of the plaintiff lost the privilege of exemption by reason of the payment of the same to Trevitic at the request of the plaintiff. The case of *Wooster v. Page* does not seem to go so far as claimed by the respondents, but would seem to favor that view. The court in that case rests its decision largely upon the decision of the same court in the case of *Morse v. Towne*, 45 N. H. 185. In the latter case (as cited by

the court in *Wooster v. Page*) it seems that "Towns having enlisted and received from the town of Pembroke a bounty of two hundred dollars, went away to the wars, leaving the money with his wife for the support of herself and their two children. The wife used a part of it, and of the rest, put into the hands of the trustee one hundred and fifty dollars, to be returned from time to time as needed for the support of the family; and for this sum the trustee gave his note, payable to her or her order. The trustee stated that he took the money expressly as the bounty money of the husband, and that the wife had no other means of support. The trustee was held chargeable on the ground that the bounty, having been paid over to the volunteer, was no longer 'bounty,' and as such exempt, but was simply 'money,' not exempt." Does this construction of a statute intended by the legislature to encourage and uphold patriotism, to secure from the humiliation of poverty and want the wife and children of the soldier, who has voluntarily offered up his life for his country, carry out the intention of the lawmakers? We think not. In the case of *Rutter v. Shumway*, 16 Col. 95, the supreme court of Colorado say: "It is claimed by counsel for plaintiff in error that the proper construction of the act of 1885 is that the wages of the debtor are exempt from garnishment while they remain in the hands of the employer before payment, but not afterwards." The act declares: "There shall be exempt from levy under execution, attachment, or garnishment the wages and earnings of any debtor to an amount not exceeding one hundred dollars, earned during the thirty days next preceding such levy, etc. (literally the same as the Idaho statute). The language is unconditional and absolute that the wages "shall be exempt from levy under execution, attachment, or garnishment," and the courts cannot justly add words which would tend to defeat or restrict the manifest purpose of the statute. So long as the wages or earnings of the debtor are capable of identification, he is entitled to have them exempt, according to the terms and provisions of the statute. We prefer the broad humanity of the "cowboy law" to the cold and technical construction which would make the intended beneficence of the law a mockery and delusion, and take the bread of the soldier and the wage-earner from the mouths of his wife and children to glut the maw of an insatiate creditor. The judgment of the district court is reversed, and judgment ordered to be entered for plaintiff for the sum of sixty-six dollars and

twenty-five cents and costs, which the clerk of the court below will enter in his judgment docket immediately on receipt of the remittitur from this court, and issue execution thereon.

SULLIVAN, C. J., and MORGAN, J., concur.

FRAUDULENT CONVEYANCES.—TRANSFERS OF PROPERTY NOT SUBJECT TO EXECUTION cannot be fraudulent as to creditors: *Blair v. Smith*, 114 Ind. 114; 5 Am. St. Rep. 593; *Freehling v. Bresnahan*, 61 Mich. 540; 1 Am. St. Rep. 617; *Union Pac. Ry. Co. v. Smerah*, 22 Neb. 751; 3 Am. St. Rep. 290; *Moore v. Flynn*, 135 Ill. 74; *Cushing v. Quigley*, 11 Mont. 577. One consequence of this principle is, that the vendee of property exempt from attachment, acquires a title to such property and its subsequent increase, good against the creditors of the vendor, without any change of possession: *Foster v. McGregor*, 11 Vt. 595; 34 Am. Dec. 713; *Wolcott v. Hamilton*, 61 Vt. 79. See also the notes to *Ruohs v. Hooke*, 31 Am. Rep. 645, and *Currier v. Sutherland*, 20 Am. Rep. 150. As to pension money, the generally received doctrine is, that it is not exempt after it reaches the hands of the beneficiary. See note to *Rozelle v. Rhodes*, 2 Am. St. Rep. 596; *Johnson v. Elkins*, 90 Ky. 163; *Contra: Crow v. Brown*, 81 Iowa, 344; 25 Am. St. Rep. 501.

EXEMPTION LAWS ARE LIBERALLY CONSTRUED: *Carpenter v. Herrington*, 25 Wend. 370; 37 Am. Dec. 239; *Favers v. Glass*, 22 Ala. 621; 58 Am. Dec. 272; *Montague v. Richardson*, 24 Conn. 338; 63 Am. Dec. 173; *Gilman v. Williams*, 7 Wis. 329; 76 Am. Dec. 219; *In re McManus*, 87 Cal. 292; 22 Am. St. Rep. 250; *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550; 16 Am. St. Rep. 855; *Collier v. Murphy*, 90 Tenn. 300; 25 Am. St. Rep. 698; *Byous v. Mount*, 89 Tenn. 362; *Rutter v. Shumway*, 16 Col. 95.

EXEMPTION OF WAGES, GENERALLY: See extended note to *Brown v. Hebard*, 91 Am. Dec. 411-425.

MILLER v. PINE MINING COMPANY.

[2 IDAHO, 1206.]

PLEADING CORPORATE EXISTENCE.—In an action against a private corporation it is necessary to allege its corporate character. The words, "a corporation," following the name of the defendant in the caption of the complaint, do not dispense with the necessity of averring corporate existence. The want of this averment may be urged under a general demurrer to the effect that the complaint does not state facts sufficient to constitute a cause of action.

Wyman and Wyman, for the appellant.

Cahalan and Badger, for the respondent.

MORGAN, J. This action was commenced in the probate court of Elmore county, on the thirtieth day of November, 1891. Complaint was filed on that date. On February 12, 1892, Wyman and Wyman appeared for the defendant, and demurred to plaintiff's complaint, on the ground that it did

not state facts sufficient to constitute a cause of action. On February 8, 1892, defendant appeared and moved the court to dissolve the attachment issued herein, and release the property therefrom. On the twenty-third day of February, 1892, the probate court heard both the motion to dissolve the attachment, and the demurrer, and overruled both. On the twenty-sixth day of April, 1892, the cause was removed to the district court, and all further proceedings were had therein. It does not appear from the record whether the demurrer was presented to the district court or not; but, as the ground of the demurrer was, that the complaint failed to state facts sufficient to constitute a cause of action, it may be taken advantage of at any stage of the action, and may even be objected to for the first time in the supreme court. An answer having been filed, the cause was tried before the court and a jury, resulting in a verdict and judgment for the plaintiff for the sum of four hundred and ten dollars, with interest and costs. From this judgment the defendant appeals to this court.

The ground of objection to the complaint is, that it appears from the caption of the complaint that the defendant is not a natural person, but is a corporation. There is no allegation in the complaint that the defendant is a corporation, nor is there any statement of facts equivalent thereto. The complaint is entirely silent upon the subject. The words, "a corporation," annexed to the name of the defendant in the title of the cause, is not an allegation that defendant is a corporation, but is a mere description of the person of the defendant: See *White v. Mullins*, 2 Idaho, 1164. In all cases where suit is brought against a private corporation, it is necessary to allege its corporate character, and the complaint is fatally defective in this respect: Bliss on Code Pleading, secs. 246, 247; *Loup v. California etc. R. R. Co.*, 63 Cal. 99; *People v. Central Pacific R. R. Co.*, 83 Cal. 393. This objection to the complaint is never waived: *Greathouse v. Heed*, 1 Idaho, 482; Rev. Stats. Idaho, sec. 4178. This averment was material. Where there is an entire absence of a material averment the defect is not cured by verdict: *Richards v. Travelers' Ins. Co.*, 80 Cal. 505; *Morgan v. Menzies*, 60 Cal. 341; *Osborn v. Graves*, 11 Or. 526. The plaintiff contends, in his brief, that defendant voluntarily admitted its corporate character, and refers to pages 22 and 23 of the transcript. These pages contain the cross-examination of witness Shaughnessy by plaintiff's attorney, as a part of the bill of exceptions, as fol-

IOWA: "Question. Of what company are you the president?
Wyman: I object. It is not to any issue in the complaint.
Court: He may answer. (Defendant duly excepts.) An-
swer. Pine Mining Company. Q. Is that a company or cor-
poration, or both? **Wyman:** Object to that as not responsive
to any issue raised by the pleadings, complaint, or answer;
as incompetent, irrelevant, and immaterial, and not the best
evidence. **Court:** Objection overruled. (And thereupon the
defendant, by its counsel, then and there duly excepted to said
ruling and now assigns said ruling as prejudicial error.) A.
It is a corporation. Q. Where was that corporation organized,
if you know? **Wyman:** I object to that as incompetent, irrele-
vant, and immaterial. **Court.** Answer. (To which ruling de-
fendant again excepted.)" It will be noticed that all of this
evidence was introduced by the plaintiff, and admitted over
the objection of defendant's attorney. The admission of this
evidence was error. No allegation appearing in the com-
plaint that defendant was a corporation, it is not responsive
to the issues. It is error, also, because not the best evidence;
the articles of incorporation, or a certified copy thereof, being
the best evidence.

It is also claimed that defendant introduced the contract
of lease between the said defendant and the said Mueller;
but the record shows that this evidence was introduced by
the plaintiff upon cross-examination, and over the objection
of defendant. This was not proper evidence of incorporation,
because of the absence of the necessary averment. For these
reasons the judgment must be reversed; and it is so ordered,
and the attachment dissolved. Costs awarded to appellant.

SULLIVAN, C. J., and HUSTON, J., concur.

PLEADING—AVERMENT OF CORPORATE EXISTENCE, NECESSITY OF.—We
have heretofore expressed our opinion that the decided weight of authority
sustained the proposition that in an action by or against a corporation in
which it was designated by a corporate name, there was no necessity
of alleging the creation or existence of the corporation: Note to *Harris v.*
Muskingum Mfg. Co., 29 Am. Dec. 375. There are, it is true, a few cases
in entire accord with the principal case upon this subject: *Holloway v. Mem-*
phis etc. R. R., 23 Tex. 465; 76 Am. Dec. 68; some of them maintaining the
extreme position that if there are several counts in the complaint, the alle-
gation of corporate existence must be reiterated in every count: *People v.*
Central Pacific R. R. Co., 83 Cal. 393; *Loup v. California etc. R. R. Co.*, 63
Cal. 99. A corporation is an artificial person, and as such has the same
capacity to sue and be sued as if it were a natural person. In a pleading
by or against a natural person, it is settled beyond controversy that it is

sufficient to designate him by his name, and that there need not be any averment either that he is a person, or that he had capacity to enter into the contract or incur the obligation sought to be enforced by or against him. It is true that the names commonly applied to natural persons are sometimes used to designate corporations, or animals, or even inanimate objects, but this has never been regarded as a sufficient reason for exacting an averment that the name used to designate the plaintiff or the defendant was the name of a person rather than of a corporation, animal, or inanimate object. The same principle ought, in our judgment, to be applied when a corporation is designated either as a party plaintiff or defendant. The allegation in the pleading that it did or failed to do any act which is the subject of controversy, or that it entered into any contract, incurred any obligation, or became subject to any duty, necessarily implies that it is a person, either natural or artificial, and the pleading cannot be properly regarded, if in other respects sufficient, as failing to state a cause of action or defense, or as disclosing a want of capacity to sue, and therefore it should be held to be impregnable to assault by demurrer, either upon the ground that the complaint does not state facts sufficient to constitute a cause of action or defense, or that it shows that the party has not capacity to sue. The cases holding otherwise stand in deserved isolation, while those dispensing with the necessity of the allegation of corporate existence are numerous and constantly increasing: *Phoenix Bank v. Donnell*, 40 N. Y. 410; *Exchange Nat. Bank v. Capp*, 32 Neb. 242; 29 Am. St. Rep. 433; *Stanley v. Richmond etc. R. R. Co.*, 89 N. C. 331; *La Grange Mill Co. v. Bennewitz*, 28 Minn. 62; *Adams Bk. Co. v. Harris*, 120 Ind. 73, 77; 16 Am. St. Rep. 315; *Smythe v. Scott*, 124 Ind. 183; *Saunders v. Sioux City Nursery Co.*, 6 Utah, 431; *Smith v. Weed S. M. Co.*, 26 Ohio St. 562; *Hart v. Baltimore etc. R. R.*, 6 W. Va. 336; *Powhatan S. Co. v. Potomac S. Co.*, 36 Md. 238; *Farmers' & M. I. Co. v. Needles*, 52 Mo. 17; *German R. Church v. Von Puchelstein*, 27 N. J. Eq. 80; *Stein v. Indianapolis B. L. Assn.*, 18 Ind. 237; 81 Am. Dec. 353; *Harris Mfg. Co. v. Marsh*, 49 Iowa, 11; *Heaston v. Cincinnati etc. R. R.*, 16 Ind. 275; 79 Am. Dec. 430; *Central Bank v. Knowlton*, 12 Wis. 624; 78 Am. Dec. 769.

CASES
IN THE
SUPREME COURT
OF
IOWA.

HOOVER v. MOWRER.

[84 IOWA, 42.]

PRINCIPAL AND SURETY.—A SECURITY TAKEN BY ONE OF SEVERAL SURETIES, bound by the same instrument, for his indemnity against loss, inures to the benefit of all, though it is received before any of them become liable, and without any agreement that the others shall participate in its benefits.

PRINCIPAL AND SURETY.—IF ONE OF SEVERAL SURETIES TAKES SECURITY from his principal for his indemnity, he is entitled, in an accounting with his co-sureties, for the proceeds of such security, to be credited with the expenses necessarily incurred in its protection and enforcement.

PRINCIPAL AND SURETY.—A SURETY TAKING FROM HIS PRINCIPAL SECURITY AGAINST LOSS, IN ACCOUNTING FOR THE PROCEEDS THEREOF to his co-sureties, is not entitled to deduct the amount of a debt due to him from his principal.

Charles E. Ransier and H. W. Holman, for the appellants.

E. E. Hasner, for the appellees.

BECK, C. J. 1. The note upon which the suit was originally brought was executed by J. J. Mowrer and his wife, Sarah Mowrer, to R. W. Adams, E. O. Craig, C. Hoover, Sr., and James Hoover, and by them indorsed to the plaintiff. The purpose of the note was to raise money for the makers upon the credit of the payees and indorsers, they becoming security for the makers. The note was the renewal of prior notes made by the parties, and a continuance, in fact, of the prior transaction. The Hoovers filed a cross-bill, alleging that that since the commencement of the action they had paid the note to the holder; that the Mowrers are insolvent; and that, for the purpose of protecting all the sureties, they executed to

Craig and Adams a mortgage upon certain town lots and a stock of general merchandise owned by them, and they took possession of the goods, and converted them to their own use. Upon this cross-bill the Hoovers pray that Craig and Adams be required to account for the value of the goods, and that the mortgage inure to the benefit of all the sureties, and that to that end, and for the purpose of protecting all, proper judgment be entered in their favor for one-half the value of the goods. Craig and Adams deny that they are cosureties of the Hoovers, and are liable to share with them the proceeds of the mortgaged property, and apply any part thereof to discharge their liability on the note.

2. We are first required to determine whether Craig and Adams may appropriate the proceeds of the mortgaged property to their exclusive benefit, or whether the mortgage should be regarded as security for all of the indorsers of the note. Counsel for the appellees state quite correctly, we think, the rule of law, "that securities obtained by one surety inure to the benefit of all." But he limits the application of the rule to cases where the securities have been obtained after all the sureties have become liable, and without any agreement to that effect before they become liable. We think these conditions alone do not limit the rule, and that its application extends to all cases where a surety attempts, by fraud or unfair dealings, to obtain advantage over his cosurety. The authorities cited by counsel, we think, do not support his position. The rule exists for the protection of the sureties, and not for the good of the creditors or the principal debtor. By the contract of sureties, they became severally bound for the debt of the principal. But it is plain that each should contribute equally in case they are called upon to pay the debt. One cannot in any way escape the burden while his cosurety is not relieved. When they enter into the contract they do so subject to that equitable rule, which becomes, as it were, a contract between them. Each surety is authorized to rely upon this rule to protect himself from imposition and fraud which his cosurety and principal might practice upon him. The principal, by indemnifying one of the sureties, would relieve him of the burden of the suretyship which the other still carried. This would be unfair and inequitable. In case it is done with the knowledge and consent of the other surety it would thereby be relieved of objection, for the surety could not complain of that to which he assents. And when sureties

do not become bound at the same time or by the same contract, as when additional or further security is demanded, and another surety becomes bound in response to such demand, the sureties can doubtless stipulate for indemnity; for by so doing they do not prejudice the prior or subsequent surety, whose burden is not affected by the indemnity, and who, as he did not become bound by the same contract with the other surety, cannot claim equality with him. In our opinion, when several sureties become bound by the same instrument, one cannot arrange with the principal for indemnity for himself without the knowledge and assent of the others. In the case before us the sureties became bound by the same instrument, and no assent was given by the Hoovers that Craig and Adams should obtain indemnity by the mortgage. Neither did the Hoovers have knowledge as to the indemnity obtained by Craig and Adams. In our opinion the proceeds of the security acquired by them must be held for the benefit of all the sureties. The district court erred in dismissing the cross-bill.

8. It appears from the evidence that Craig and Adams realized eleven hundred and twenty-six dollars and forty-two cents out of the goods. They paid for rent, clerk hire, and other expenses, which are not disputed by counsel on either side, one hundred and fifty-eight dollars and seventy-five cents. They also paid fifty dollars attorneys' fees in defending against a garnishment proceeding to charge them for the mortgaged property. As these fees were expended in protecting the property which created the fund now in question, they ought to be paid out of that fund. A mortgage on the goods to Cook, amounting to two hundred and eighty-six dollars and eighty-five cents, was paid by Craig and Adams. It was executed by J. J. Mowrer, and not by his wife, to whom the goods had been transferred, and who executed the mortgage to Craig and Adams. Counsel for the Hoovers insist that the mortgage did not bind the property, and, therefore, should not have been paid. But as J. J. Mowrer was in possession of the goods and conducting the store as his own, it is hardly probable that his wife could successfully set up a claim against the mortgage to Cook. It is not shown that at the time there was any lien against the property superior to the mortgage to Cook. We think Craig and Adams should have credit for the amount paid upon the mortgage—two hundred and eighty-six dollars and eighty-five cents. This,

added to the other expenditures approved, gives four hundred and sixty dollars and sixty cents, the sum to be allowed them. They claim that they should be allowed two hundred and two dollars on account of a note on which Adams was surety, which he paid, and seventy-five dollars owed directly by Mowrer to Adams. The mortgage taken by Craig and Adams operated for the benefit of all the sureties. They ought not to be permitted to lessen the funds realized from the mortgage by appropriating it to their individual claims. They stand as trustees for all the sureties, and are required to use that trust fund for the benefit of the sureties alone. The goods realized eleven hundred and twenty-six dollars and forty-two cents; expenses and Cook mortgage, four hundred and sixty-five dollars and eighty-five cents; leaving six hundred and sixty dollars and fifty-seven cents to be paid for benefit of sureties. One-half of this sum the Hoovers are entitled to recover, for which a decree and judgment will be entered in this court.

The Hoovers recovered judgment against Craig and Adams in this action for eight hundred and forty-seven dollars and ninety-six cents. No complaint is made thereof, and no appeal is taken therefrom; it is not for consideration in this case. The decree dismissing the cross-bill is reversed.

SURETYSHIP—TAKING SECURITY—RIGHTS OF SURETIES.—A surety is entitled to share the benefit of any security which his cosurety has taken from the principal, for his own indemnity against loss, before being damnified: *Brown v. Ray*, 18 N. H. 102; 45 Am. Dec. 361; *McMahon v. Fawcett*, 2 Rand. 514; 14 Am. Dec. 796. This question is further discussed in the notes to *Gross v. Davis*, 10 Am. St. Rep. 642, and *Hall v. Cushman*, 43 Am. Dec. 563, where the cases are collected.

WHARTON v. STEVENS.

[84 IOWA, 107.]

WATERS—SURFACE—IF BY THE FLOW OF SURFACE WATERS THROUGH A SWALE A DITCH HAS BEEN CUT in the bottom thereof the owner of the land has no right to dam up such ditch if thereby he injures the owner of another tract by retarding the flow of the water in drains placed in the swale on the lands of such other owner.

IF SURFACE WATER FLOWS BY A WELL-DEFINED COURSE, BE IT IN A DITCH OR SWALE, in its primitive condition, and seeks discharge in a neighboring stream, its flow cannot be retarded or interfered with by a landowner to the injury of neighboring proprietors.

MANDATORY INJUNCTION may issue to compel the removal of obstructions placed in a ditch so as to retard the flow of the water as it was before such obstructions were built.

J. F. and W. R. Lacey, and Severs and Severs, for the appellant.

Blanchard and Preston, for the appellee.

BACK, G. J. 1. The facts of the case, as shown by the undisputed evidence or a satisfactory preponderance thereof, are not at all intricate, and, briefly stated, are as follows: The farms of the parties join. A swale, having branches upon the plaintiff's farm, extends into and through the defendant's farm. The rain and snow water collected on the plaintiff's land by the natural depression flows in the swale across the defendant's land, finding its discharge in a creek or brook beyond. There are no springs upon the plaintiff's land. The breadth of land which these swales drain is shown to be about eighty rods, and the hills and elevated lands on each side are about fifteen feet high. There is a ditch in the swale washed out by the natural action of the water, which is shown to be three feet deep. It extends to and upon the defendant's land for some distance, but not through his farm. The plaintiff has put tiling along the swales, there being two drains at proper distances from the middle of the swale, so as to catch the seep at or near the foot of the declivity along the swale. These drains, uniting at the main swale, extend to within three feet of the defendant's land, and discharge there into the ditch. The source of these drains is shown to be fifteen feet higher than the mouth. The defendant, a few feet below his line, filled up the ditches, and constructed an embankment over it for a roadway, putting in a small wooden culvert, which, he testifies, is about as high as the surface of the ground. Other witnesses declare it is considerably higher. While the embankment was so constructed as to be used for a road, it was doubtless erected for the primary purpose of arresting the flow of water, and raising it above the mouth of the plaintiff's drain, thus interfering with their usefulness. Before the dam was erected the drains answered the purpose of their construction; after it was built they in a great measure failed, as the water could not flow from them freely, but was backed into them for some distance. The dam created a pond extending upon the plaintiff's land to some extent.

2. The controlling question in the case involves the right of the defendant to maintain the dam across the ditch and swale, so as to interfere with the free flow of water from the plaintiff's drains. It must be kept in mind that the ditch

in question was the result of the action of the water in accord with nature's laws, and that the swale was the watercourse provided by nature for the escape of water from the plaintiff's land. Neither was artificial. See *Vannest v. Fleming*, 79 Iowa, 642; 18 Am. St. Rep. 387. It will not be pretended that the defendant could arrest the flow of the water down the swale, if nature, by the action of the water, had made no ditch there. If he could build a dam one foot high, throwing the water back upon the plaintiff's land, he could build it fifteen feet high, did his notions as to the demands of his interest, or his desire to injure the plaintiff, prompt sufficient outlay of labor or money, and he could thus convert the plaintiff's valuable land into a marsh or pond. This dam, the building of which he justifies in this case, does this very thing in a limited degree. But, as we have said, he does not claim to build a dam higher than the natural surface of the swale. He admits the right of the plaintiff to demand that no impediment shall be erected against the flow of the water over the surface of the natural swale, but denies his right to conduct water in the ditch, which is, as well as the swale, a natural drainage-way for the plaintiff's land: *Vannest v. Fleming*, 79 Iowa, 638, 642; 18 Am. St. Rep. 387. It would be a bold counsel who would advocate, and a bold court which would decide, that water from rains and thawing snows, which is called by counsel "surface water," when it finds the swales provided by nature to bear it away, may be arrested in its natural course, and made to flow back upon the land which these swales are intended to drain. The effect of such a decision would be stupendous. It would subject millions of acres of the best agricultural land to destruction. It would bring strife, with loss and poverty to a vast number of farmers of the state. But no counsel asks such a decision and no court would make it. But counsel do maintain that, where nature has provided a ditch in these swales, the landowner may dam up the water and throw it back upon the land of his neighbor, and in that way prevent the use of his tile drains and create ponds thereon. This doctrine, if recognized by this court, would forever prevent tiling in swales (the great benefits of which are known to all, and abundantly shown in the evidence in this court), except in cases where the consent of the adjoining proprietors is obtained. This court is not prepared to recognize a rule so detrimental to the interests of the state, and in conflict with sound legal principles and precedent. It

has held the contrary doctrine, that the drains may be used to carry water accumulating in swales—surface water—and discharge it upon low lands crossed by such swales, which are nature's drains and waterways: *Vannest v. Fleming*, 79 Iowa, 642; 18 Am. St. Rep. 387. See Washburn on Easements, 3d ed., 450, 452, 453.

8. The water caused by the swales is called by counsel "surface water," and this talismanic word seems in some cases to take the place of reason and principle in the support of the right of the lower proprietor to throw back upon the higher land the water flowing in ditches washed out by the natural action of the water. The books often announce the rule that the landowner may fight surface water, which is a common enemy, and keep it off his land, and even throw it upon his neighbor, or back upon the land from which it flows. But the books do not hold that this may be done when there is a waterway over which the water naturally flows. It may be that the language of some cases is so general that it will bear an interpretation to that effect, when nothing of the kind was meant, and no such point was in the case. Counsel cite this language in Washburn on Easements, 3d ed., found on page 459, viz: "The common law allows the proprietor of lower tenants to obstruct the natural flow of surface water from higher ground upon it and in so doing may turn it back upon, or off, onto or over the lands of the other proprietors." It will be discovered, by a little consideration, that this is not the language of the author, but is a citation from a Wisconsin case; and, moreover, that it authorizes a proprietor to turn surface water upon the lands of adjoining owners, the very thing which is the defendant's ground of complaint against the plaintiff. Upon this language the plaintiff may turn the water in question "onto or over" the lands of the defendant. The doctrine is clearly laid down on pages 451-453, and elsewhere, by this authority, that the lower proprietor cannot prevent the flow of rainwater from the higher lands through natural depressions and channels. There is apparently a conflict of authorities on this point which is not real, resulting from the undefined use of the words "surface water." When such water flows by a well-defined and natural course upon lower lands, that flow cannot be interfered with by either the upper or lower proprietor. But when such water has no defined course, but spreads out over the land without a well-defined course, it may be turned by the landowner in any

direction. But where surface water has a fixed and certain course, as a swale, though it may be narrow or broad, its flow cannot be interrupted to the injury of an adjoining proprietor. The evidence in this case shows that the water of the swale on the plaintiff's land had a considerable fall, sufficient to cause it to cut a ditch three feet deep, which continued upon the defendant's land; that the tiling would not carry off the water except in gentle rains; that heavy rains caused a stream in the ditch; that to render more productive the swale land, and arrest the seep from the little hills, plaintiff put in the tiling; that the tiling causes no increase in the quantity of water, but causes it to pass off more gradually; and that it increases the value of the plaintiff's land. The part of the defendant's land where the ditch had not been cut off may receive the water for a prolonged period, but not a larger quantity, and if he suffers any inconvenience therefrom, it is very plain that nature will relieve him by continuing the ditch, and by the use of his plow he can so speed the extension of the ditch, which nature will complete in a season or two. Why should he be permitted, in order to protect his swale where slough grass grows, to compel the plaintiff to lose the benefits of the tile drains? It was well said in *Livingston v. McDonald*, 21 Iowa, 173, 89 Am. Dec. 563, by Dillon, J., that "we recognize the general rule that each may do with his own as he pleases; but we recognize the qualification that each should so use his own as not to interfere with his neighbor. *Sic utere tuo ut alienum non lædas.*" The defendant cannot use his swale, keeping it in a state of nature, to produce slough grass, and thereby injure the plaintiff's land by rendering it less productive.

This court is not prepared to hold, on the ground that the designation "surface water" is applied to the water flowing in the swale, that though flowing in a well-defined course, with a fall which gives its current sufficient to wash out the ditch, it may be dammed so as to throw it back upon the plaintiff's land, and prevent the proper use of the tile drains. The words "surface water" have no such magic influence as to demand the recognition of rules that would work gross injustice, and arrest the improvements and progress in the cultivation of agricultural lands. As we have intimated, consideration of the books will reconcile the seeming conflicts upon this point. To effect such reconciliation it is only to be mentioned that the authorities all hold that when water, be

It surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it in a ditch or swale, in its primitive condition, and seeks discharge in a neighboring stream, its flow cannot be arrested or interfered with by the landowner, to the injury of the neighboring proprietors. These views and conclusions are well supported by the following authorities: *Vannest v. Fleming*, 79 Iowa, 638; 18 Am. St. Rep. 387; *Livingston v. McDonald*, 21 Iowa, 160; 89 Am. Dec. 563; Washburn on Easements, 3d ed., 450-454; *Anderson v. Henderson*, 124 Ill. 164; *Gormley v. Sanford*, 52 Ill. 158; *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 484; 95 Am. Dec. 627; *Peck v. Goodberlett*, 109 N. Y. 180; *Jeffers v. Jeffers*, 107 N. Y. 650; *McCormick v. Horan*, 81 N. Y. 86; 37 Am. Rep. 479; *Martin v. Riddle*, 26 Pa. St. 415; *Hays v. Hinkleman*, 68 Pa. St. 324; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445; *Kauffman v. Griesemer*, 26 Pa. St. 407, 415; 67 Am. Dec. 437; See *Rhoads v. Davidheiser*, 133 Pa. St. 226; 19 Am. St. Rep. 630; *Taylor v. Fickas*, 64 Ind. 173; 31 Am. Rep. 114; *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213; *McDaniel v. Cummings*, 83 Cal. 515; *Lord v. Carbon Iron Mfg. Co.*, 42 N. J. Eq. 157; *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 11 Ch. Div. 782; 8 Law Rep. Ann. 277, in notes to *Vannest v. Fleming*, 79 Iowa, 638; 18 Am. St. Rep. 387; *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395; *Schnitzius v. Bailey*, 48 N. J. Eq. 409. It will be observed that in *Vannest v. Fleming*, 79 Iowa, 638; 18 Am. St. Rep. 387, this court held that, "the owner of the dominant or higher estate has the right to conduct the water falling upon his lands by means of underground tile drains, with the channel provided by nature for the drainage of his land, and through such channel to cast it upon the servient or lower estate"; and that a swale and a ditch made by the natural flow of the water constituted a channel for the natural drainage of the water. This decision is decisive of the case before us.

4. Counsel for the defendant insist that *Vannest v. Fleming*, 79 Iowa, 638, 18 Am. St. Rep. 387, is not applicable to the case before us, for the reason that the ditch in that case was dug and maintained under agreement of the owners of the land, the grantors of the respective parties. This is true as to the ditch involved in the first count of the petition, but not of that complained of in the second. The plaintiff in the action claimed to recover for damages sustained by two separate ditches. The first count does not show or allege that the

ditch was made by natural causes, by consent, or with the united labor of the parties: See *Vannest v. Fleming*, 79 Iowa, 639; 18 Am. St. Rep. 387. The court discusses the question arising on this count without any reference to an agreement or joint labor for the construction of the ditch, for there was none in the case of the first count: See *Vannest v. Fleming*, 79 Iowa, 639, 641-643; 18 Am. St. Rep. 387. The opinion, however, holds that, as the parties or their grantors acquiesced in the course of the ditch, they will not now be permitted to complain of its location and manner of construction. But it is not intimated that the plaintiff's rights depended upon the acquiescence of the defendant in the location and manner of constructing the drains.

5. Counsel for the defendant, upon the authority of *Livingston v. McDonald*, 21 Iowa, 161, 89 Am. Dec. 563, demanded the reversal of this case. They give undue weight to that case, in view of the questions actually in the case and decided by the court. Much is said in it upon the subject of surface water and the rights and liabilities of landowners involved in the disposition thereof. The learning and ability displayed in the opinion are great, but it more especially states doctrines recognized by authorities referred to, rather than announces rules of law generally recognized. It illustrates the confusion and uncertainty in many of the books treating of this subject. The learned judge delivering the opinion in the following direct and plain language states the points decided in the case: "The court [below], in substance, laid down the law to the jury to be that, if the ditch in question increased the quantity of water upon the plaintiff's land to his injury, or, without increasing the quantity, threw it upon the plaintiff's land in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant was liable for the damage thus occasioned, even though the ditch were constructed by the defendant in the course of ordinary use and improvement of the farm." "Upon the whole, we think the law in this case was properly stated." The question as to the right of the defendant to flow surface water on the plaintiff's land was not solved adversely to that right. The court simply inquired whether the quantity of the water was increased, or whether it was thrown upon the plaintiff's land in a different manner from the natural way; and held that, if the question should be answered affirmatively, the defendant was liable. To this ruling there could be no objec-

tion. But we have heretofore shown that no increase of water is thrown upon the plaintiff's land: See also *Vannest v. Fleming*, 79 Iowa, 641-643; 18 Am. St. Rep. 387. The manner of conducting the water to the defendant's land is not different from what the manner was before the tiles were laid. In each case it is conducted by a drain—first by an open drain,—a ditch; then by a tile drain, which did not reach the defendant's land, but discharged the water into the old ditch, a little distance from the defendant's land, and it flowed upon the defendant's land at the identical place through which it flowed before the tiles were put in. The water obviously was thrown upon the defendant's land in the precise manner in which it was conducted before the tile drains were put in. This precise point was determined in *Vannest v. Fleming*, 79 Iowa, 638, 643; 18 Am. St. Rep. 387.

6. The decree required the defendant to remove the obstructions he put in the ditch so as to restore the flow of the water as it was before the dam was built, and permitted him to have a roadway over the ditch if he maintained an opening for the water to flow under the roadway, as prescribed by the decree. It does not require him to dig any new ditch; simply to take out the obstruction he put in the old one, and keep an opening for the flow of the water.

The foregoing discussion disposes of all points arising in the case which are necessary to be determined in the decision of the case. The judgment of the district court is affirmed.

SURFACE WATERS—RIGHT TO INTERFERE WITH FLOW OF.—Where surface water seeks an outlet through a gorge or ravine, and by its flow assumes a definite and natural channel through which it flows at regular seasons, one adjacent landowner has no right to obstruct such flow to the damage of another: *Gibbs v. Williams*, 25 Kan. 214; 37 Am. Rep. 241, and note; *Rhoads v. Davidheiser*, 133 Pa. St. 226; 19 Am. St. Rep., 630 and note; *Hartshorn v. Chaddock*, 135 N. Y. 116. The owner of an estate for the purpose of protecting his reasonable use may obstruct and divert surface waters thereon, by ditches, drains or other structures, and in so doing may lawfully hinder the natural flow of such waters, and turn the same back on to or over the lands of other proprietors, without liability for injury ensuing from such obstruction or diversion: *Johnson v. Chicago etc. R. R. Co.*, 80 Wis. 641; 27 Am. St. Rep. 76, and note; *Chadeayne v. Robinson*, 55 Conn. 345; 3 Am. St. Rep. 55, and note. This question is further discussed in *Rowe v. St. Paul etc. Ry. Co.*, 41 Minn. 384; 16 Am. St. Rep. 706, and especially the note to that case.

MANDATORY INJUNCTION—REMOVAL OF OBSTRUCTION FROM WATER-COURSE.—When water from either springs, rains, or melting snows has flowed over land in a defined channel, since the time when the memory of

man runneth not to the contrary, on to the lands of an adjoining proprietor, the court will by a mandatory injunction require such adjoining proprietor to remove any obstruction placed upon his land to prevent such water from flowing to and over his land: *Schnitzius v. Bailey*, 48 N. J. Eq. 409. Equity will decree the removal of an obstruction in a watercourse as well as enjoin its future obstruction: *Earl v. De Hart*, 1 Beas. Ch. 280; 72 Am. Dec. 394, and note; *Belknap v. Belknap*, 2 Johns. Ch. 463; 7 Am. Dec. 548. To unreasonably obstruct a watercourse is a private nuisance, and in such cases equity will interfere by injunction to prevent irreparable damage: *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72. Equity has power to prevent by injunction injuries by the back flowage of water caused by a dam: *Sheldon v. Rockwell*, 9 Wis. 166; 76 Am. Dec. 265, and note, to the same effect, see, *Farris v. Dudley*, 78 Ala. 124; 56 Am. Rep. 24.

COULTHARD v. STEVENS.

[84 IOWA, 241.]

ACCRETIONS.—A LANDOWNER IS ENTITLED TO LANDS WHICH ARE ADDED TO HIS THROUGH THE OPERATION OF FLOODS and of changes in the channel of a river, occurring in several different years, though the greater portion was added in a single year, and that it was being so added could be seen at the time. The terms of "alluvion," on the one hand, and "gradual and imperceptible" accretion, on the other, are used to contradistinguish the sudden disruption of a piece of ground from one man's land to another, which may be followed and identified, from that increment which slowly or rapidly results from floods, but which is utterly beyond the power of identification. The length of time during formation is not material.

S. H. Cochran, for the appellants.

Dewell and McGavern, for the appellee.

KINNE, J. 1. The land, the title whereof is brought in controversy in this action, is situated immediately adjacent to the banks of the Missouri river. It is not disputed that the plaintiff acquired by contract of purchase from the county three lots of land, which it acquired under the swamp land grant. Nearly all of the land cultivated by the defendant, to recover the value of the use whereof this action is brought, lies between the meandered line of these lots and the Missouri river, and is claimed by the plaintiff as accretions to his land. The defendant and the intervenor not only deny that the land is accretions, but insist that the time and manner of its deposit preclude its being so treated.

George Coulthard testified: "The floods made an immense pile of land there." "I think this land was put there from

1860 down to the present time, caused by gradual formation to it." "It has been a good many years making it."

Charles Pate, a witness for the defendant and the intervenor, testified: "I have lived in Harrison county thirty-four years. I have worked on the Missouri river, rafting logs, from time to time, for last twenty years. I am familiar with the river. I know where the meander line of these Coulthard lots was. All this land in controversy was thrown up onto these lots suddenly. It was put there pretty much in one summer. As near as I remember, it was in the summer of 1874 the river threw up against there fractional pieces about one-half mile in width. I could see it being thrown up. It would made strips of land in two hours' time one hundred and fifty feet to two hundred feet wide right at this place, opposite Coulthard's lots. Stevens commenced farming this land about three years ago. All of his cornfield was suddenly formed." Cross-examination: "I know where the old meander line was. I rafted by it. This land was thrown up so you could see it build there. I have been over this Coulthard land frequently. The river changed its channel. It threw up the land suddenly. There were jump-offs between the old meander line and the river. These jump-offs represent the layers suddenly thrown in there."

Lewis Meyers testified: "This formation was made by a sudden change in the channel. I saw some of the first land formed. It was by sudden cut of the river. I have never known the river along there making anything but sudden change. By 'sudden change,' I mean in the course of a week or a month; and generally at the time of high water is when the changes occur."

2. The district court gave this instruction to the jury:

"The uncontroverted evidence in this case shows that lots 1, 2, and 3, in section 34, township 79, range 45, passed to the state of Iowa under the swamp grant of September 28, 1850, and was certified to the state; and thereafter, in 1860, the state patented the said land to Harrison county, and that the plaintiff is now the owner of the same, under a contract made with Harrison county in 1887. The evidence further shows that one boundary of the lots was the meandered shore line of the Missouri river, and that since the survey by the government the land in question occupied by the defendant, not originally a part of said lots, has been added to said lots, or some of them, by the action of the waters of

the Missouri river, and under such circumstances, as shown by the evidence, that, under the law of accretions, such added land became a part of the lots in question, or some of them; and you are therefore instructed that, as a matter of law, under the evidence the plaintiff is the owner of the tract of land occupied by the defendant, and upon which he raised a crop for the season of 1889. The plaintiff will therefore be entitled to recover of the defendant the reasonable value of the use of such land for the season of 1889, and you are instructed that the burden is upon the plaintiff to prove such reasonable value. You will therefore assess and determine from the evidence the reasonable value of the use of such premises so occupied by the defendant, as shown by the evidence, and find the amount thereof in the plaintiff's favor. You are further instructed that the title to the land being in the plaintiff, the occupancy by the defendant having been shown by the uncontroverted evidence, the defendant is not entitled to recover upon the counterclaim anything for alleged damages by reason of the suing out of the attachment herein. You are also instructed that the intervenor is not entitled to recover, for the same reason, and his petition is dismissed."

The defendant asked the district court to instruct the jury as follows:

"Second. 'Accretion,' under the law, is defined to be the imperceptible adding of land thrown up by a sea or river gradually. The land in question was added to lots 1, 2, and 3, but, unless it was slowly, gradually, and imperceptibly washed up or thrown up to said fractions by the river, the plaintiff cannot recover.

"Third. If you find from the evidence that the land in question was suddenly made by the change in the channel of the river, or by the sudden cutting of the opposite bank, then your verdict should be for the defendant."

These instructions were refused.

3. "Accretion, to vest a title in the owner of the abutting shore, must be so slow that its increase should be imperceptible": 1 Am. & Eng. Ency. of Law, 137. To acquire title to land as alluvion it is necessary that its increase should have been imperceptible; that is, that the amount added in each moment of time should not be perceived. It has been said: "It is enough if it were done so that they could not perceive the progress at the time it was being made": 3 Washburn on Real Property, 4th ed., 59; *County of St. Clair v.*

Lovington, 23 Wall. 46; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178. "The terms 'alluvion' on the one hand and 'gradual' and 'imperceptible' accretion on the other are used by writers to contradistinguish a sudden disruption of a piece of ground from one man's land to another which may be followed and identified from that increment which slowly or rapidly results from floods, but which is utterly beyond the power of identification. . . . The length of time during formation is not material": *Benson v. Morrow*, 61 Mo. 352.

It will be noticed that these definitions are not entirely in accord. We think the true rule is the doctrine laid down in the case last quoted. Applying it to the facts in this case it will be seen that there is no evidence tending to show that these additions to the land of the plaintiff, and which he claims as accretions, were caused by a sudden disruption of a piece of ground from the land of another, and which could be followed and identified. Nearly all the testimony is to the effect that this land in controversy has been years in forming, and that the process has been gradual. But one witness testifies to such a sudden formation as is comprehended in the definition given, and there is an entire absence of evidence as to anyone being able to identify the added land. Conceding that, under the rule long since adopted by this court, the case should have been sent to the jury if there was any evidence tending to establish the claim of the defendant and that of the intervenor, we think the evidence fully justified the instruction given by the district court, and its judgment is affirmed.

ACCRETION AND ALLUVION.—The law on this subject has already been discussed at considerable length in notes to *Hagan v. Campbell*, 33 Am. Dec. 276-281; *Lovington v. County of St. Clair*, 16 Am. Rep. 524, 528; and *Mulry v. Norton*, 53 Am. Rep. 215, 221. The only object attempted or sought to be attained here is to collect the more recent cases which tend to firmly establish the rules governing this topic, and to reconcile any conflict which may have existed in the earlier cases.

Definition.—Accretion is an increase or addition to riparian land gradually and imperceptibly made by alluvial formations of soil or sand, occasioned by the water to which the land is contiguous, through either natural or artificial causes: *County of St. Clair v. Lovington*, 23 Wall. 46; 64 Ill. 56; 16 Am. Rep. 516; *Lammers v. Nissen*, 4 Neb. 245; *St. Louis etc. Ry. Co. v. Ramsey*, 53 Ark. 314; 22 Am. St. Rep. 195. To create an accretion by alluvion there must be an addition to land coterminous with the water, formed so slowly that its progress cannot be perceived; but this does not admit of the view that, in order to be accretion, the formation must be one not discernible by comparison at two distinct points of time. The test as

to what is gradual and imperceptible in the sense of the rule is that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on: *Jefferis v. East Omaha Land Co.*, 134 U. S. 178-193, affirming the same case in 40 Fed. Rep. 386. Alluvion is the term applied to the deposit itself, while accretion denotes the act: *St. Louis etc. Ry. Co. v. Ramsey*, 53 Ark. 314; 22 Am. St. Rep. 195. Accretion being a gradual and imperceptible addition to land is always to be distinguished from avulsion, which is a sudden and perceptible loss to or addition to land by the action of water or otherwise.

Riparian Owner's Right to Accretions.—It is a general rule that the title of a riparian owner of land on a navigable river or other stream extends to the line of high water. If the river is non-navigable then such title extends to the middle of the stream, and up to the line of his ownership the riparian proprietor takes all accretions arising from a gradual change in the bed of the stream. In other words, a person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, will still hold by the same boundary, including the accumulations, and is without remedy for his loss by the same means: *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48; *Camden and Atlantic Land Co. v. Lippincott*, 45 N. J. L. 405; *McClure v. James*, 7 Lea, 98. The rule that a riparian owner takes all accretions arising from the gradual change of the river-bed, applies when land, though not originally riparian, becomes so when the river reaches it by gradually washing away all the intervening land. The remoter land then becomes riparian as much as if it had been originally such, and a right to accretion will attach thereto: *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48. Land newly formed by accretion belongs to the riparian owner owning the fee to the bed of the stream although it extends beyond the shore line as it existed before a washing away of the land which preceded the new accretion: *St. Louis v. Rutz*, 138 U. S. 226. It is also a general rule among the states which border on the Mississippi river that the owner of land bounded on one side thereby is entitled to all accretions made to such land by the river: *St. Louis v. Lemp*, 93 Mo. 477; *McClure v. James*, 7 Lea, 98; *St. Louis v. Rutz*, 138 U. S. 226. And it seems to be the law in Louisiana that when the owner of land bounded by such river conveys it to the line of a levee along the river he does not thereby convey his rights to accretions which have attached to it since his purchase, unless such alluvial rights are specially mentioned and described as being conveyed by the deed: *Ferriere v. New Orleans*, 35 La. Ann. 209. If however such accretions are specially mentioned in the deed, the grantee takes them unless they are needed for public purposes: *Donovan v. New Orleans*, 35 La. Ann. 461.

When the grantee of land on a navigable stream takes to the meander line thereof, accretions to such land belong to such riparian owner and cannot be selected, platted and sold as swamp and overflowed lands: *Minto v. Delaney*, 7 Or. 338.

When land is conveyed as being bounded by Lake Michigan, the line between the land and the water will form the boundary, and such line will follow the receding water so as to pass the accretion thus formed to the grantee, not as an appurtenant to the land granted, but as part of it: *Chicago Dock and Canal Co. v. Kinsie*, 93 Ill. 415.

In Wisconsin, though the owner of land bounded by any meandered lake or pond takes no fee in the bed or soil under the water, yet he has a right to all accretions formed by slow and imperceptible degrees upon or against

his land, and to that portion of the bed of the lake or pond adjoining his land which may be uncovered in the same manner by recession of the water: *Boorman v. Sunnucks*, 42 Wm. 233.

The rule that soil added by accretion to lands fronting upon water as a boundary belongs to the owner of such land applies when the addition is made wrongfully by human hands or agency: *Steers v. Brooklyn*, 101 N. Y. 51.

In a state in which the bed of a navigable river is susceptible of private ownership, accretions extending from the shore belong to the owner of the shore line, but accretions arising in the river and extending toward the shore belong to the owner of the river-bed, which at low tide is not submerged, though it is entirely covered at high tide. "If the land in question was formed by gradual accessions extending from the shore into the river it would belong to the riparian proprietor, and this would be the case notwithstanding the fact that by the influence of floods and freshets, large deposits of mud may have been made in the bed of the river.

"These deposits would, of course, materially contribute to the formation of land, and would hasten the time when it would appear above the surface of the water. But the leading characteristic of alluvion is the gradual extension of the land from the shore into the water; and when this is the case it is irrelevant to consider the causes which, operating beneath the surface of the stream, have brought about the result; on the other hand, if land was formed in the river and extended towards the shore, it would be the property of plaintiff, with all its accretions," he being the owner of the bed of the stream: *Linthicum v. Coan*, 64 Md. 439; 54 Am. Rep. 775.

The increase of land bounded by the seashore, formed and derived from alluvion of so gradual a formation that the addition cannot be observed while actually going on, although a visible increase takes place from year to year, is such accretion as belongs to the owner of the land: *Camden and Atlantic Land Co. v. Lippincott*, 45 N. J. L. 405.

It has been decided, however, under the peculiar law in force in Louisiana, that accretions to the shore of Lake Pontchartrain, it being an arm of the sea, are not susceptible of private ownership, and that such alluvion does not therefore become the property of the owners of the lots fronting on such lake. In that state it seems that it is the accretion made by rivers and streams only that belongs to the owners of land adjacent thereto: *Zeller v. Southern Yacht Club*, 34 La. Ann. 837.

The general rule undoubtedly is that in grants of land lying along the seashore the parties act with knowledge of the variety of changes to which all parts of the shore line are subject, and that the grantee by such a boundary takes a fee which shifts with such changes as take place, and is obliged to accept the situation of his boundary by the gradual changes to which the shore line is subject. He is subject to loss by the same means which may add to his territory: *Wilson v. Shiveley*, 11 Or. 215. And as he is without remedy for his loss, so he is entitled to the gain which may arise from alluvial formations, and he will in such case hold by the same boundary, including the added soil gained by accretion: *Camden and Atlantic Land Co. v. Lippincott*, 45 N. J. L. 405.

When the shore line of land is surveyed and fixed as crossing a reef projecting into the water, and accretion has since attached to the end of the reef, far removed from such shore line, which has not changed since the survey was made, the land thus formed by alluvion does not belong to the owner of the land so surveyed. The right of an owner of land bounded by

the shore to claim accretion depends entirely upon its contiguity. It must be immediately attached to the shore line: *Fulton v. Frandolig*, 68 Tex. 330. Thus, to entitle an owner to claim an alluvial formation, or land gained from a lake by alluvium, the lake must form a boundary to his land, and if any land lies between his boundary line and the lake he has no right to such accretion: *Bristol v. County of Carroll*, 95 Ill. 84. And the owner of a lot bounded on one side by a street which is located along a river is not entitled as a riparian owner to accretions formed on the opposite side of the street: *Ellinger v. Missouri etc. Ry. Co.*, 112 Mo. 525. Nor in such case is he entitled to accretions which form in the street: *St. Louis v. Missouri etc. Ry. Co.*, 114 Mo. 13; *Succession of Delachaise v. Maginnis*, 44 La. Ann. 1043. Land formed between the east bank of the Mississippi river and an island in front of it, due to a dyke built by the United States government from the shore to the island, belongs to the riparian owner; and the fact that more land has been restored to him than was previously washed away cannot deprive him of this riparian right: *St. Louis v. Rutz*, 138 U. S. 226.

Land formed by natural accretion upon the bank of a navigable stream belongs to the riparian owner, even though the accretion has so materially reduced the size of the stream as to render it non-navigable: *Fillmore v. Jennings*, 78 Cal. 634.

The right to accretions depends upon their formation subsequent to the purchase of the land, consequently a riparian owner cannot claim title to land by accretion when the formation occurred before he obtained his grant from the government, and the latter had already sold the land as accretion to other parties: *Bissell v. Fletcher*, 27 Neb. 582. The right of an owner of land to accretions already formed is undoubtedly a vested right, but the right to future accretions is not a vested right, as there can be no such present right in that which may never have an existence: *Eisenbach v. Hatfield*, 2 Wash. 236. An easement in land for a boat-landing attaches to accretions thereto formed by the stream: *Town of Freedom v. Norris*, 128 Ind. 377. When a railway company has lawfully built an embankment into the bed of a river below the high-water mark, and such mark is changed to the further side of the embankment, the riparian owner cannot claim title to the land up to such last high-water mark, on the ground that his boundary has been changed by accretion: *Chicago etc. Ry. Co. v. Porter*, 72 Iowa, 426.

The right of a riparian owner to claim land formed by accretion to his own ceases when the formation passes the line of his coterminous owner: *Mulry v. Norton*, 100 N. Y. 424; 53 Am. Rep. 206; and when the shore lines of two tracts of land divided by a watercourse receive accretions until they come together the line of contact will then be the division line: *Buss v. Russell*, 86 Mo. 209.

Title to accretions is held subject to the same encumbrances and with the same benefits as the title to the land to which the accretion is made. If the riparian owner is barred, or partially barred, by the statute of limitations as to the bank he will be barred as to the accretions in like manner although they may have been deposited but a year or a day: *Campbell v. Laclede Gas Light Company*, 84 Mo. 352.

Accretion how Affected by Conveyances.—When land fronting on a river or other body of water is conveyed by deed the right to accretion already attached passes to the grantee, although not specially mentioned, unless it is expressly reserved: *Meyers v. Mathis*, 42 La. Ann. 474; 21 Am. St. Rep. 385. Thus land formed by accretion on a fractional quarter section is part

thereof, and passes by a deed conveying the fractional quarter by its number: *Tappendorf v. Downing*, 76 Cal. 169.

A riparian owner, upon conveying land bounded by navigable waters, may reserve to himself the right to any subsequent accretions: *People v. Jones*, 112 N. Y. 597; and when the deed permanently fixes the boundary line of the land conveyed at a certain point so that it is not changeable by the changes in the high-water mark of the water to which the land is adjacent accretions outside of the boundary thus permanently fixed do not belong to the grantee: *Cook v. McClure*, 58 N. Y. 437; 17 Am. Rep. 270. A grantor of land up to the line of a public road or street bordering on a river retains no estate to which the right to future accretions can attach: *Delaclaire v. Maginnis*, 44 La. Ann. 1043.

A lease of lots for ninety-nine years includes the use and right to possession of accretions thereto during the period of the lease, and such right is not affected by a conveyance of the accretions by the lessor, although he may convey the remainder in fee in them after the termination of the lease: *Rutz v. Kehr*, 143 Ill. 558.

APPORTIONMENT.—The rule generally recognized and applied for the distribution of alluvial accretion formed on lands bordering on a stream and owned by adjacent proprietors is to first ascertain the length of the shore line before any alluvion had been deposited, and then that of the new shore line, and to divide this amongst such riparian owners in proportion to the length owned by them on the old shore line: *Batchelder v. Keniston*, 51 N. H. 496; 12 Am. Rep. 143; *Millern v. Hepburn*, 8 Bush, 326, note to *Hagan v. Campbell*, 33 Am. Dec. 280. The rule is thus stated in *Kehr v. Snyder*, 114 Ill. 313; 55 Am. Rep. 866: Measure the entire river front as it was found when the lots were laid out and before any accretion had formed “and note the aggregate number of feet frontage, as well as that of each parcel or lot, then measure a line drawn as near as may be with the middle thread, of so much of the stream as lies opposite the shore line so measured. Having done this divide the thread line so measured into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measures feet on the shore line. Then complete the division by drawing lines between the points designating the lot or parcel belonging to each proprietor both upon the shore and river lines.” In Vermont a rule prevails to extend the side lines of each owner to the nearest river-bank giving to each that part of the accretion formed in front of his land: *Hubbard v. Mansell*, 60 Vt. 235; 6 Am. St. Rep. 110. This rule is entirely unsupported by authority outside of that state, and is directly opposed to many cases which assert that in all modes of division of accretion no regard is to be paid to the direction of side lines between the contiguous owners: *Manchester v. Point St. Iron Works*, 13 R. L. 355; *Batchelder v. Keniston*, 51 N. H. 496; 12 Am. Rep. 143, disapproving *Newton v. Eddy*, 23 Vt. 319.

Avulsion.—When grants of land border on running water, and the banks are changed by the gradual process known as accretion, the riparian owner's boundary line still remains the bank of the stream, but when the boundary stream suddenly abandons its old bed and seeks a new course by the process known as avulsion, the boundary remains where it was in the center of the old channel, whether this is dry or not: *Nebraska v. Iowa*, 143 U. S. 359; *Bullenuth v. St. Louis Bridge Co.*, 123 Ill. 535; 5 Am. St. Rep. 545. As a result it may be stated that when changes in the middle or thread of the stream are made suddenly, without removing the intermediate soil, such as

cutoffs, or the changing of the channel from one side of an island to the other, the riparian rights in the soil not moved by the water do not change with the thread of the stream: *Bonewille v. Wygant*, 75 Ind. 41-44. When the bed of a stream changes suddenly by reason of a flood or freshet, the boundary line of land bordering on such stream will not change but will remain as it was originally. Hence the sudden and perceptible loss of land of a riparian owner which is visible in its progress does not deprive him of his fee in the submerged land to the thread of the old river channel, or change his boundaries on the river front as they existed when the land commenced to be washed away: *St. Louis v. Rutz*, 138 U. S. 226. And a riparian owner on a navigable river, whose land is washed away by rapid and perceptible changes, and lodged in the river opposite during spring floods, is entitled to so much of such land as forms in the river by this process between the adjacent shore and the middle thread of the river, together with accumulations caused by the gradual washing away of an island above his land, and which fills the space between the shore and the new formation in the river: *Rutz v. Seeger*, 35 Fed. Rep. 188.

Islands and Accretions Thereof.—The law of accretion applies to alluvial formations in the beds of streams and the owner in fee of the bed of a river or other submerged land is also the owner of any bar, island, or dry land which may be subsequently formed thereon: *St. Louis v. Rutz*, 138 U. S. 226. When opposite owners on a river-bank own to the center of the stream, islands in such river belong to the owner of the bank on whose side of the center they lie, and if they divide the main channel they will themselves be divided in ownership between the bank proprietors: *Bonewille v. Wygant*, 75 Ind. 41-44. Thus, the law of Illinois confers upon the owner of land in that state which fronts upon the Mississippi river the title to the bed of the river to the middle thereof, so far as the boundary of the state extends, and the riparian owner is entitled to all islands in the river which are formed on its bed east of the middle of its width, and it is impossible for the owner of an island which is situated on the west side of the middle of the river and in the state of Missouri to extend his ownership by mere accretion to lands situate in the state of Illinois: *St. Louis v. Rutz*, 138 U. S. 226. When an island in a river is owned by one party, while the river-bank is owned by another, accretion to the island which grows and extends toward the bank until it reaches what was originally the river boundary, belongs to the owner of the island and not to the owner on the bank of the river: *Naylor v. Cox*, 114 Mo. 232. Thus when an island in a river has been surveyed by the United States, and sold to a party who receives a patent therefor, he or his grantee will become the owner of any accretions to such island, or of land formed by avulsion from the washing away of the upper part of the island and the sudden formation of new land on the lower end thereof: *Wiggenhorn v. Kountz*, 23 Neb. 690; 8 Am. St. Rep. 150. Accretion to an island owned by the United States so as to connect it with an island owned by a private party does not belong to the latter. If, on the other hand, the alluvion forms to the island owned by such private party he is entitled to such accretion: *Benson v. Morrow*, 61 Mo. 345.

In determining the question as to whether a bar or island is part of the land upon either side of the stream the relative size and permanence of the channels which surround it, the size of the island as compared with the size of the stream, and the conformity or divergence of course between the meander line and the main channel must all be taken into account: *Shoemaker v. Hatch*, 13 Nev. 261. The right of accretion to an island in a river can-

not be so extended lengthwise of the river as to exclude the riparian proprietors above or below such island from access to the river as such proprietors: *St. Louis v. Ruts*, 138 U. S. 226.

When, after submergence of land on the seashore, the water disappears by gradual retirement, or by elevation of the submerged land so as to form an island, the ownership of the original proprietor is restored, so far as the island lies in front of his upland, but the right to claim ownership in the island ceases when the formation passes laterally the line of the coterminous owner: *Mulry v. Norton*, 100 N. Y. 424; 53 Am. Rep. 206. Or if an island is washed away, in whole or in part, after it is surveyed and patented, and then re-forms on the same bed, the owner of it as it was before it was so washed away is entitled to it; but if it was washed away, and the land sought to be recovered was made by deposits to and against the mainland owned by another party, such deposits belong to the owner of the mainland, and not to the owner of the island so washed away: *Bass v. Russell*, 85 Mo. 209. The law of title by accretion has no application to an island which is a mere accumulation of alluvial deposits traveling more than a mile, and from one state to another almost instantaneously. An instantaneous transfer of a quarter of a mile of land by the action of water will not confer title by accretion within the meaning of the law on that subject: *St. Louis v. Ruts*, 138 U. S. 226.

FIRST NATIONAL BANK v. O'CONNELL.

[84 IOWA, 377.]

COLLATERAL SECURITIES.—TO AN ACTION ON THE PRINCIPAL DEBT THE DEFENSE THAT COLLATERAL SECURITIES GIVEN for its payment have been lost or rendered worthless through the negligence of the creditor is admissible.

COLLATERAL SECURITIES.—THE HOLDER OF COLLATERAL SECURITIES MUST AT LEAST EXERCISE SUCH DILIGENCE in their collection that they shall not be lost through the operation of the statute of limitations, and if such statutory defense has become perfect, the giver of the collateral security may, by a counterclaim, recover the value of his collateral, though it has not yet been ascertained that his debtor will, when sued on such collateral, plead such statute in defense.

Healy and Healy, and Martin and Wambach, for the appellant.

D. D. Chase, J. F. Duncombe, and A. N. Botsford, for the appellees.

GRANGER, J. On the 24th of July, 1880, the firm of O'Connell and Springer made to the plaintiff bank its note for eight hundred and seventy-five dollars, due thirty days after date, and the action is to recover thereon. As a defense to the action it is averred in the answer that the defendant Springer delivered to the plaintiff, as collateral to the note in suit, certain tax-sale certificates of the value of three hundred dollars, and

that some two hundred and fifty dollars was paid to the county auditor in redemption, which the plaintiff neglected to take and apply on the note. Also that certain promissory notes were delivered to the plaintiff, as collateral security, against one Norton, of the aggregate value of three hundred dollars; that the notes have become barred by the statute of limitations; and the defendants say that the proceeds of the certificates and notes were lost to them because of the negligence of the plaintiff in caring for and applying the proceeds thereof. A reply puts in issue the defensive averments of the answer.

1. This is a law action, and the evidence is such that the district court have found that the certificates and notes were left as collateral to the note in suit, and that the plaintiff bank was negligent in failing to obtain the redemption money from the auditor, and in not taking steps for the collection of the Norton notes before action thereon was barred by the statute of limitation. It remains for us to determine the law as applicable to such facts.

It is urged by the appellant that the facts as stated are not available as a defense before the defendants have paid the note in suit, or made a tender of payment; and some authorities are cited in support of such a rule. The authorities cited go to the support of the following and quite similar propositions: "The return of a pledge is not a condition to be performed before or concurrently with the payment of the debt secured": Jones on Pledges, sec. 593. A tender is necessary to enable the pledgor to maintain trover against the pledgee for a conversion of securities when the lien created by the pledge has not been otherwise discharged: *Jarvis v. Rogers*, 15 Mass. 389. From the foregoing and other kindred propositions the appellant deduces a rule for this case as follows: "We contend that in a law action the pledgor, where sued upon the note, can make no question as to the conduct of the pledgee with reference to the pledge, unless prior to the commencement of the action he has paid or tendered the pledgee's debt." In connection with this language we are cited to *Courtright v. Deeds*, 37 Iowa, 507, and *Nelson v. Wilson*, 75 Iowa, 710. Neither case supports such a rule. In the first it is held that, "no action at law can be maintained for money to be paid upon the delivery of a release, unless there has first been a delivery or a tender of the release," and in the second, that there can be no recovery upon a subscription

to pay a railway company a certain amount when the road was completed to a certain point, on the condition that upon the payment there shall be delivered to the subscriber a certificate of stock, etc., unless a tender of the stock was first made. The case of *Fletcher v. Harmon*, 78 Me. 465, seems at first view to give the rule, as claimed, some support, but it will be observed on a careful reading that the defendants pleaded that the plaintiff had sold the collateral notes, "and had received the full face value thereof, exceeding the amount sued for"; while the proofs showed that the plaintiff "surrendered the securities pledged to a stranger, who claimed to own the same"; the court remarking, that "the evidence adduced does not tend to support the defendant's plea"; the thought of the case being that, under the allegations of the answer, the plaintiff had, by a sale of the notes, received money for the payment of his note, for which he must account under the collateral contract, while the proof showed that he had wrongfully disposed of the notes without any avails applied in payment. The case is really one of a fatal variance between the allegations and proofs. In this case the wrongful act is pleaded, and, in effect, damages asked equal to the claim sued upon. This must be permissible, under the liberal provisions of code, sec. 2659. The wrongful acts of the plaintiff as to the notes and certificates would certainly be a "cause of action in favor of the defendants against the plaintiff, arising out of the transactions connected with the subject of the action": Subdivision 2. If so, it may be presented as a counterclaim. We have carefully examined the authorities cited by the appellant, and have found no case supporting the rule as claimed, when considered with reference to the issues involved.

2. It is also urged that it was not the duty of the plaintiff to sue on the notes, nor to collect the money from the auditor and apply the same. This involves the question of the diligence required of a pledgee to preserve the property held by him as security. Mr. Tiedeman, in his work on Commercial Paper, sec. 304, says: "In the collection and maintenance of actions on the pledge, the pledgee is charged with the exercise of ordinary diligence in saving and protecting the rights of the pledgor." This seems to recognize the rule that there must be due diligence in maintaining actions. The appellant, however, cites this section, and we infer that reference is made to the following: "But mere delay in bringing suit

on the collateral security is no negligence. On the contrary, the pledgee is not obliged to sue at all on the collateral security." We are satisfied that the learned author, in this latter connection, has no reference to negligence or diligence in the preservation of the security, but has reference to negligence in failing to realize on the collaterals instead of directly from the pledgor, for in the same connection he uses these words: "He may, instead, bring his action against his own debtor, without first proceeding against the parties to the collaterals." The only authorities cited in the text quoted as supporting appellant's view are *Marschuets v. Wright*, 50 Wis. 175, and *Cherry v. Miller*, 7 Lea, 305, neither of which in any degree supports such a rule. Many of the cases on this point present the question of negligence in preserving collateral paper from loss because of the insolvency of the makers, but the same rule must be applicable to the loss of such paper because of the operation of the statute of limitation. In the case of *Wheeler v. Newbould*, 16 N. Y. 399, in speaking of the diligence required as to such papers, it is said: "The primary, and indeed the only, purpose of the pledge is, to put it in the power of the pledgee to reimburse himself for the money advanced when it becomes due and remains unpaid. The contract carries with it an implication that the security shall be made effectual to discharge the obligation." The language is quoted, and the last sentence italicized in *Lamberton v. Windom*, 12 Minn. 232; 90 Am. Dec. 301. This latter case quotes from 3 White & T. Leading Cases in Equity, 556, 557, where the author, speaking of the diligence required of a creditor with collaterals, says: "He must use due diligence in the management and collection of securities binding the persons or estates of third persons at the risk of discharging the debt itself if guilty of negligence, and with it, of course, all liability on the part of principal or surety." See *Lawrence v. McCalmont*, 2 How. 454, and *Goodloe v. Clay*, 6 B. Mon. 236. The case of *Lamberton v. Windom*, 12 Minn. 232, 90 Am. Dec. 301, is a very conclusive authority on this question, as well as the one considered in the former division of the opinion: See also *Semple etc. Mfg. Co. v. Detwiler*, 30 Kan. 386.

3. The note in suit became due August 23, 1880, and the collateral notes were not barred by the statute until 1888 and 1889; and it is urged that the failure of the defendants to pay their note for that length of time was negligence in regard to the collateral notes, and defeats their purpose in

this suit, and it is said: "The rule is, that where a party is entitled to the benefit of a contract, and can save himself from loss arising from a breach of it, at a trifling expense or with reasonable exertions, it is his duty to do so, and he can charge the delinquent with such damages only as, with reasonable endeavors and expense, he could prevent." The rule is without application to the facts of this case, but we need not discuss the point, for no issue of that kind appears in the record. If the appellant seeks to avoid its negligence because of that of the defendant, it should be placed under code, sec. 2665.

4. A point is made that the maker of the collateral notes might not have availed himself of the bar of the statute—that he might have waived it; and this is urged against the plaintiff's liability for such notes. The defendants in this suit have the right to an adjudication upon the facts establishing their legal rights, and are not required to pass them by, trusting only to the favor of those released from legal obligation. The judgment should be affirmed.

COLLATERAL SECURITY—DILIGENCE IN COLLECTING—COUNTERCLAIM—Collateral security having been given to secure the payment of a debt, the amount thereof will be deducted from it, where the creditor permitted it to be lost by not exercising ordinary diligence towards its collection: *Ramsey v. Laidley*, 34 W. Va, 721; 26 Am. St. Rep. 935, and note; *Roberts v. Thompson*, 14 Ohio St. 1; 82 Am. Dec. 465, and note; *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20. The question of the diligence required of the holders of collateral securities in collecting the same, and their liability for failing to do so, is discussed at length in the notes to the following cases: *McQueen's Appeal*, 49 Am. Rep. 595; and *Miller v. Gettysburg Bank*, 34 Am. Dec. 451.

SOUKUP v. UNION INVESTMENT COMPANY.

[34 IOWA, 412.]

APPELLATE PROCEDURE—THE FAILURE TO SERVE A NOTICE OF APPEAL ON ONE OF THE PARTIES is not jurisdictional to the extent of depriving the court of the power to consider and determine such questions in the case as may be decided without affecting his rights.

TAX DEEDS—DESCRIPTION.—"West part, northeast quarter, northwest quarter, twenty acres," section 36, is a sufficient description, because it is equivalent to the west twenty acres, or the west half of the forty-acre tract.

TAX DEEDS.—IT WILL BE PRESUMED THAT NOTICE OF THE EXPIRATION OF THE TIME FOR REDEMPTION was properly served, when a tax deed has issued, and the statute makes it *prima facie* evidence of the regularity of all proceedings prior to its execution.

TAX CERTIFICATES.—IF AN ASSIGNER OF A TAX CERTIFICATE INDORSES HIS AGREEMENT THEREON that he will not procure a deed for the premises, or some part thereof, every assignee under him is bound by such agreement, and precluded from obtaining or enforcing a conveyance in violation thereof.

DEED IN WHICH THE GRANTOR DESCRIBES HERSELF AS THE WIDOW AND SOLE HEIR of J. C. B. does not prove nor tend to prove that she is such widow or heir.

EXECUTION OR FORECLOSE SALE BASED UPON A SATISFIED JUDGMENT IS VOID.

George W. Wilson, for the appellants.

Hormel and Harrison, for the appellee.

GIVEN, J. The appellee contends that, as the defendant Barnhill, treasurer, does not join in the appeal, and was not served with notice thereof, the appellant cannot prosecute this appeal. Mr. Barnhill, though a proper, was not a necessary, party to the action as presented in the petition. All that was asked as to him was that he be enjoined, as treasurer, from issuing a tax deed to his codefendant on a certain certificate named. The plaintiff's relief would have been complete by an injunction restraining the defendant company from receiving such a deed. The treasurer is in no wise concerned in, or even a proper party to, the issues joined in the cross-bill and reply, as in those issues neither party is claiming anything under the certificate to Mr. Stewart. In *Moore v. Held*, 78 Iowa, 538, it is held that a failure to serve notice upon coparties is not jurisdictional, but the court can consider such questions in the case as affecting only the rights and interests of the appellant and the adverse party. See, also, *Nesselrode v. Parish*, 59 Iowa, 570. It does not appear that Mr. Barnhill, treasurer, has any rights or interest in conflict with the claims of either of the other parties to the case. The appellant has the right, under this appeal, to have the questions in the case, as between it and the appellee, considered.

2. It will be noticed that in his petition the plaintiff only claimed title to the southwest quarter of the northeast quarter of the northwest quarter of section 36, being ten acres; but by the cross-bill of the defendant company, and the plaintiff's reply thereto, it appears that each is claiming title to the west half of said northeast quarter of the northwest quarter of section 36. The plaintiff's title is founded upon two tax deeds—one issued October 15, 1868, to R. P. Kingman, on a sale for the taxes of 1864; and the other issued September

10, 1880, to James C. Young, on a sale for the taxes of 1872. James C. Young, through several intermediate grantors, by quitclaim acquired the title of Kingman, and thereafter, on January 17, 1881, conveyed by quitclaim to John M. Curless, who conveyed by warranty deed, dated December 27, 1881, to the plaintiff, who went into possession, and has been in possession ever since. The questions made as to the plaintiff's title relate entirely to the two tax deeds.

The questions made as to the tax deed to Kingman on sale for the taxes of 1864 are that the north ten of the twenty acres described therein were taxed to one N. B. Brown for that year, and that Brown paid said taxes. It is also contended that the description of the land in the deed to Kingman is too indefinite. The appellant's abstract shows that the treasurer testified that Brown paid the tax of 1864, but it is denied in the appellee's additional abstract that he so testified; and nothing further appearing, we must act upon the denial, and hold that the defendant failed to prove payment by Brown.

The description in the deed to Kingman is, "West part, northeast quarter, northwest quarter, twenty acres," of said section 36. We think the description sufficiently definite to identify the lands conveyed. If it were "west half, northeast quarter, northwest quarter," of said section, its sufficiency would not be questioned; but it is "West part, northeast quarter, northwest quarter, twenty acres." The words "twenty acres," added, as they are, render the description sufficiently definite. "That is certain which may be rendered certain." This description covers the west twenty acres of the forty described, and its identity may be ascertained by measurement. It will be found upon examination that the description is noticeably different from any of those held to be insufficient. In *Roberts v. Deeds*, 57 Iowa, 320, cited, the description "Northwest part of northeast section 31, township 74, range 8 west, containing three acres," was held not to describe the lands owned in that section by Deeds, as what he did own lay only along part of the west line of said tract. It is there said: "The decisive question in this case is this: Is the description used in the tax-books and deed sufficient to identify the land owned by Deeds? It was held that it did not, because of the peculiar form of the lands so owned, as stated in the opinion. In *Collins v. Storm*, 75 Iowa, 36, also cited by the appellant, the description was, "the west fractional half quarter of the north-

west quarter of section 7," etc. This was held not to describe the land in question or any particular part of it. It will be seen, on comparing these descriptions with the one in question, that they lack the certainty that the words here used express.

3. The only question presented as to the tax deed to James C. Young is that the notice of expiration of time for redemption was not served upon the person in whose name the land was taxed. It appears that a notice was served on John M. Curless by James C. Young on or prior to May 19, 1879. The precise date is not shown in the return, but it must have been on or before the nineteenth, as upon that day Mr. Young verified the return, and the notice was filed on the twentieth. There is no evidence as to whom the land was taxed in 1879, but the appellee contends that we must presume that it was taxed to the same person to whom it was taxed in 1878, and that, as this was not John M. Curless, the service of the notice on him did not confer the right to execute the deed. The deed being *prima facie* evidence of the regularity of all proceedings prior to its execution, it must be presumed, in the absence of a showing to the contrary, that the notice was served upon the person in whose name the land was taxed. There being no showing to rebut this presumption, we must hold that the notice was properly served upon John M. Curless.

4. It was upon the strength of this title that the appellee asked in his original petition that the defendants be enjoined from executing and receiving a tax deed on the certificate to William Stewart. Stewart assigned this certificate to the plaintiff's grantor, Curless, and upon it was indorsed the agreement of Curless not to sell or transfer the same, "nor procure the treasurer's deed for said premises. I have sold and conveyed to Joseph Soukup, by warranty deed, free from all encumbrances whatever." The appellant took this certificate with that indorsement thereon, and is not entitled to a deed under it. Therefore, unless the appellant's title is superior to that of the appellee, the appellee is entitled to an injunction as prayed in the original petition.

5. We next inquire as to the appellant's title. Jason C. Bartholomew, holding under patent from the United States, conveyed the north half of the west half of the northeast quarter of the northwest quarter of said section 36, which tract passed by successive conveyances to one J. H. Lansley, who conveyed to appellant. Prior to his conveyance to the appel-

lant, Lansley received a quitclaim deed from Susan Olney for the entire forty, in which the grantor is named as "Susan Olney, formerly widow and sole heir of Jason C. Bartholomew, deceased." That she was such widow or heir cannot be inferred from the recitations in the deed; therefore, we cannot say from the deed alone that the appellant acquired any title thereunder to the land in question.

6. A sheriff's deed dated January 20, 1888, covering this land, was made to J. L. Wilson, who conveyed to Lansley before Lansley's conveyance to the appellant on a sale on a judgment against Curless for some nine or ten dollars costs accruing in the foreclosure of the mortgage. It appears quite satisfactorily that the judgment and costs had been paid long before the issuance of the execution upon which this sale was made, a former execution upon which the money was made not having been returned.

Without discussing the appellant's abstract of title further, it is sufficient to say that the defendant acquired all the title that it now asserts after the commencement of this action; that it took nothing by the sheriff's deed to Wilson, nor by the quitclaim deed from Susan Olney to Lansley; that its only shadow of title is to the north half of the west half of the northeast quarter of the northwest quarter of said section, which title in its grantors was divested by the two tax deeds under which the appellee holds the property. Another consideration in favor of the appellee is the fact that he was in undisturbed possession of the land for more than eight years.

We think the equities of the case are with the appellee, and that the judgment of the district court should be affirmed.

TAX DEEDS.—SUFFICIENCY OF DESCRIPTION IN: See *Cocks v. Simmons*, 55 Ark. 104; 29 Am. St. Rep. 28; *Knight v. Alexander*, 38 Minn. 384; 8 Am. St. Rep. 675, and note; note to *Reber v. Dowling*, 7 Am. St. Rep. 652; *Wofford v. McKinna*, 23 Tex. 36; 76 Am. Dec. 53, and note.

TAX DEEDS.—PRESUMPTION AS TO REGULARITY FROM RECITALS THEREIN. The recital in a tax deed of compliance with the statutory requirements is not even *prima facie* evidence of such compliance: *Brown v. Wright*, 17 Vt. 97; 42 Am. Dec. 481, and note; *Jackson v. Shepherd*, 7 Cow. 88; 17 Am. Dec. 502, and extended note; unless made so by statute: *Worthing v. Webster*, 45 Me. 270; 71 Am. Dec. 543, and note; *Miller v. Miller*, 96 Cal. 376; 31 Am. St. Rep. 229, and note. But where the statute makes a tax deed presumptive evidence of the regularity of all prior proceedings, the burden of showing irregularities is upon the owner in an action by the holder of the deed to quiet title: *Hurd v. Brisner*, 3 Wash. 1; 28 Am. St. Rep. 17, and note. A tax deed regular upon its face is *prima facie* evidence of the regularity of the proceedings: *Washington v. Hosp*, 43 Kan. 324; 19 Am.

St. Rep. 141. In several states statutes have been recently enacted requiring purchasers at tax sales to give notice of the expiration or the time of redemption, or of the time when an application would be made for a tax deed. Very generally this provision has been inserted by way of amendment to a general revenue act, in which was a preëxisting provision remaining unrepealed, to the effect that a tax deed in regular form was *prima facie* evidence of title, and in some instances conclusive evidence of the existence of many precedent essential steps. Whether the giving of the notice to redeem is proven by the deed is a question about which the courts differ. The principal case assumes the affirmative, and personally we see no ground for any other conclusion; but the number, if not the weight, of decisions is to the contrary: *Miller v. Miller*, 96 Cal. 376; 31 Am. St. Rep. 229, and note.

EXECUTION SALE UPON SATISFIED JUDGMENT.—A sheriff's sale upon a satisfied judgment is void: *Boos v. Morgan*, 130 Ind. 305; 30 Am. St. Rep. 237, and note; note to *Reynolds v. Ingersoll*, 49 Am. Dec. 62.

DWYER v. CHICAGO, ST. PAUL, AND OHIO RY. CO.

[84 IOWA, 479.]

DEATH, DAMAGES FOR CANNOT INCLUDE PAIN AND SUFFERING.—In an action by an administrator to recover damages for the death of his intestate resulting from the defendant's negligence, no allowance can be made for the pain and suffering of the decedent. The measure of damages is not the loss or sufferings of the deceased, but the injury resulting from his death to his family. Neither his pain and suffering nor the wounded feelings of his surviving relatives can be taken into account in estimating the damages.

J. H. and C. M. Swan, for the appellant.

Joy, Hudson, Call and Joy, for the appellee.

GRANGER, J. The plaintiff is the administrator of the estate of Ann Dwyer, deceased, who was on the ninth day of July, 1889, struck by defendant's cars, as a result of which she died about thirty days thereafter. The petition specifies the injuries sustained, and adds: "All of which caused her great pain and suffering for a period of about thirty days, when she died from such injuries." A motion to strike out the words as to pain and suffering was overruled, and the court instructed the jury that, if it found for the plaintiff, to allow a "reasonable compensation for pain and suffering." The jury returned a general verdict for the plaintiff for three thousand dollars, and specially found that two thousand, three hundred dollars of the amount was for "pain and suffering," and seven hundred dollars "as damages to the estate."

An assignment brings in question the correctness of the court's action in permitting the jury to consider pain and suffering as an element of damage. The action was commenced after the death of the plaintiff's intestate. If the action had been commenced in her lifetime, it is unquestioned that pain and suffering caused by the injury would have been a proper element of damage, and this would be true if, after the commencement of the action, she had died, and her administrator had been substituted as party plaintiff, and prosecuted the suit to judgment: *Muldowney v. Illinois Central Ry. Co.*, 38 Iowa, 462. We come, then, to the important inquiry if such damages are permissible in such a case, where the action is commenced by the administrator. The only authority for maintaining such an action by the legal representative is by virtue of the statute. At the common law, the cause of action abated with the death of the injured party. The law authorizing the action is found in code, section 2525. "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." We are cited to no case, in this or any other state, where the rule contended for by the appellee, and allowed by the district court, has been sustained. It is claimed, however, that the reason for this, as to other states, is because of the peculiarity of the statutes under which such actions are permitted to survive. In several cases this court has expressed its view as to the measure of damages in such cases, and in such a way that the appellant regards the law on this point as settled in its favor, while the appellee regards the language thus relied upon as merely incidental to other points determined, and in no way decisive of the question now before us. It is true that the precise question now before us was not involved for determination in any of the Iowa cases cited, and the language relied upon by the appellant has been used incidentally in the discussion of other questions; but it is not to be understood, because of this, that such language is without value in our deliberations on this question; for much of the language so used is in regard to questions so allied to this in its legal significance as to make them determinable upon quite similar considerations. For instance, the rule as to the measure of damage in cases of this kind has been considered, and, with the point before us in view, a rule excluding such damage has been adopted.

In *Ross v. Des Moines Val. Ry. Co.*, 39 Iowa, 246, it is said:

"The action is brought by the administrator for the injury to the estate of the deceased sustained in his death. There is therefore no basis for damage for pain and suffering. . . . Compensation for the pecuniary loss to his estate is alone to be allowed." See, also, *Donaldson v. Mississippi etc. Ry. Co.*, 18 Iowa, 280, 87 Am. Dec. 391, and *Muldowney v. Illinois Central Ry. Co.*, 36 Iowa, 468. In the latter case the action was commenced by the injured party, who died pending the suit, and his administrator was substituted; and it was held that pain and suffering were proper elements of damage because of the action having been commenced by the injured party; but the court guards the rule by saying: "A different rule would obtain if the action had been commenced after his death." It is thought that the expression may be accounted for on the theory that the case was determined under a different statute. Revised Statutes, section 3467, under which the action arose, is as follows: "No cause of action *ex delicto* dies with either or both of the parties, but the prosecution thereof may be commenced or continued by or against their personal representatives." With reference to the particular matter under consideration, it is difficult to trace a distinction between the statutes. The one says, in effect, that such causes of action shall survive the party, and the other that it does not die with the party. The effect of each is to create a survival, and the one as plainly as the other contemplates the existence of the cause of action before the death. It is not the effect of either, as seems to be thought by the appellee, to create a cause of action because of the death. The statutes deal with the "cause of action," and not with the rule of damage to be applied. In fixing the damage, we look to the wrong to be remedied; to the injury to be repaired. If the action is brought by the injured party, the law attempts to remedy the wrong to him—not specifically to his estate—and that may include loss of property, time and that bodily ease and comfort to which he is entitled as against the wrongdoers. If the action is brought to repair an injury to his estate, the law looks, in fixing the rule of damage, to how the estate is affected by the act, and attempts to repair the injury. Loss of time and expenses paid, as a result of the wrong, presumably lessen the estate, but bodily pain and suffering in no manner affect it. It is an item of damage peculiar to the person, and not to pecuniary or property rights. Under our statute, these damages belong "to the estate of the deceased": Code,

section 2526. This distinction is maintained throughout all the cases and authorities that have come to our notice. This court has repeatedly said that these actions are for "injury to the estate": See cases cited *supra*: *Ross v. Des Moines Val. Ry. Co.*, 39 Iowa, 246; *Donaldson v. Mississippi etc. Ry. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Muldoney v. Illinois Central Ry. Co.*, 36 Iowa, 462. Mr. Sutherland, in his work on Damages (volume 3, p. 282), speaking in general of these statutes of survival of actions, says: "The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family. It is only for pecuniary injuries that this statutory right of action is given. Although it can be maintained only in cases in which an action could have been brought by the deceased if he had survived, damages are given on different principles and for different causes. Neither the pain and suffering of the deceased, nor the grief and wounded feelings of his surviving relatives, can be taken into account in the estimate of damages." In *Railroad Co. v. Barron*, 5 Wall. 90, a like case, it is said, speaking of the wife or next of kin, who, under the Illinois statutes, are the beneficiaries in such a case: "They are confined to the pecuniary injuries resulting to the wife and next of kin; whereas, if the deceased had survived, a wider range of inquiry would have been admitted. It would have embraced personal suffering as well as pecuniary loss, and there would have been no fixed limitation as to the amount." The language of the Illinois statute is different in phraseology from ours, but not to the extent of inducing a different rule in this respect. Under the statute of Minnesota, so similar to ours as to justify the same rule as to these damages, it is held that "no compensation can be given . . . for the pain and suffering of the deceased": *Hutchins v. St. Paul etc. Ry. Co.*, 44 Minn. 5. We conclude, without doubt, that the district court erred in its ruling on the motion and the instruction to the jury.

Some other questions are argued which we have examined, the consideration of which would require extensive quotations from the evidence, and we think they do not involve reversible error, and it is unnecessary to discuss them. The cause is remanded to the district court, with instructions to deduct from the judgment entered the twenty-three hundred dollars allowed for pain and suffering, and give judgment for the balance.

Modified and affirmed.

DAMAGES FOR DEATH—PAIN AND SUFFERING.—In an action for negligence causing death, damages should not be allowed for the pain and suffering of the deceased before his death: *Donaldson v. Mississippi etc. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391, and note; *Carlson v. Oregon etc. Ry. Co.*, 21 Or. 450; *Texas etc. Ry. Co. v. Lester*, 75 Tex. 56. This question will be found thoroughly discussed in the notes to the following cases: *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 377, *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 535, and *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 638.

BROWNELL v. CHAPMAN.

[84 IOWA, 504.]

DAMAGES, MEASURE OF.—FOR THE BREACH OF A CONTRACT TO FURNISH BOILERS AND MACHINERY FOR A BOAT to be used at a summer pleasure resort, the damages allowable include the rental of the boat during the time the owner is deprived of its use, and also the value of his services and the sums necessarily paid to his employees during the time he and they were kept in idleness by reason of the breach of the contract.

DAMAGES MAY INCLUDE THE RENTAL VALUE OF A BOAT, THOUGH IT HAS NEVER BEEN COMPLETED so that it could be rented, where its not being so completed was the result of a breach of the contract sued upon. Its rental value may be ascertained by the evidence of persons having knowledge of the business for which it was intended to be used and the price paid for the use of other boats in the same business.

ACTION to recover a balance alleged to be due for furnishing engines and other machinery for defendant's boat. The plaintiffs' contract, dated April 12, 1889, guaranteed the delivery of the work in thirty days after April 18th of the same year. They did not complete their work until eighteen days after the time stipulated, and the defendants in this action interposed a counterclaim for damages resulting from such delay, which, being allowed in the trial court, the plaintiffs appealed.

Isaac Adams, for the appellants.

D. B. Daily, Emmet and Finley, and Ambrose Burke, for the appellee.

GRANGER, J. 1. Lake Manana is a small lake in the vicinity of Council Bluffs, in Pottawattamie county, and is a summer and pleasure resort. Boats are used on the lake for the accommodation of visitors, and among them was one known as the *M. F. Rohrer*, belonging to the defendant. The boat was operated on the lake in the season of 1888, and the boilers and machinery contracted for, as known to the parties, were to refit the boat for use in the season of 1889. A breach of

the contract on the part of the plaintiff, by a failure to deliver within the time, is not questioned, and the important question on this appeal is as to the proper measure of damage.

The superior court admitted evidence to show, and instructed the jury on the theory, that the measure of damage was the rental value of the boat during the time the defendant was deprived of its use in consequence of the breach.

The appellants' thought is that the measure of damage is the "interest of the capital invested in the boat." This latter rule has something of support in authority, but it is far outweighed by the number of cases and the reasoning supporting the rule adopted by the court. In considering the question we must keep in view the rule, universally recognized, that the damage for breach of contract must be limited to such as would naturally come within the contemplation of the parties at the time the contract was made. The plaintiff, when it agreed to furnish and set the boilers, knew they were to be used in operating the boat; that a breach on its part would deprive the plaintiff of its use; and it would naturally contemplate the value of such use as the injury that would be sustained; and such is, as a matter of fact, the actual damage. The appellants cite a number of cases, but all except two, we think, support the rule adopted by the court. *Brown v. Foster*, 51 Pa. St. 165, is a case quite similar to this. Repairs to a boat by putting in machinery were to be completed by October first. The work was not done until December fifteenth. The trial court gave, as the rule of damage, "that the measure in such a case is the ordinary hire of such a boat for the time in question for the time the plaintiff was in default." The complaint in that case of the rule as given was by the defendant who was seeking damage, and the court said his complaint was without reason. The case cited is not authority for the appellants' position. In *New York etc. Mining Syndicate v. Fraser*, 130 U. S. 611, 665, the interest on the investment in a mill that had been delayed because of defective machinery was allowed as the measure of damage, but only in case the jury found there was no evidence of the rental value of the mill. The case clearly recognizes the rule as to rental value as a correct one. In *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, is the following syllabus, having full support in the opinion: "Upon a breach of a contract to deliver at a certain day a steam-engine built and purchased for the purpose of driving a planing-mill and other definite

machinery, the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for want of the steam-engine may be regarded as damages." In *Nye v. Iowa City Alcohol Works*, 51 Iowa, 129, 33 Am. Rep. 121, this general principle has support argumentatively, but another rule, because of distinguishing facts, is sustained. The cases of *Allis v. McLean*, 48 Mich. 428, and *Taylor v. Maguire*, 12 Mo. 313, are not in harmony with this view, but they are clearly overborne by the weight of the other cases and the current of authority. The latter case cites, as decisive of the point, *Blanchard v. Ely*, 21 Wend. 342; 34 Am. Dec. 250. In *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, the Blanchard case is commented upon and explained, and, in effect, it is divested of the authority claimed for it in the Missouri case.

But it is said that the boat in question had no established rental value. By this it is meant that the boat had never been rented. But it will not do to say that because an article has never been rented it has no rental value, any more than it would to say that because an article had never been sold it has no market value. We should assume that an article suitable and adapted for use at a time and place has both a market and rental value, at least until the contrary appears. In *Jemmison v. Gray*, 29 Iowa, 537, this court approved an instruction that "the fact, if proven, that twelve thousand two hundred and thirteen ties could not have been purchased for immediate delivery in the market at the places where said ties were to be delivered on the first day of October, 1869, would not of itself establish the fact that there was not a market price for such ties at such time and place." The holding affords a strong presumption in favor of a market price. A like presumption would prevail in favor of an article having a value for hire at a time and place where such articles are in demand for use. The testimony shows that boats varying in size were rented on the lake during the season, both by the day and for trips. This boat had perhaps twice the carrying capacity of any other boat on the lake, and in that respect formed an exception; but the rental value of boats depended on their size and adaptation for use, and it was competent for persons having knowledge of the business and prices paid for other boats to give an opinion as to the rental value of such a boat as the one in question. It is contended that the method of ascertaining the rental value involves the

uncertainties and facts on which profits are excluded as a rule of damage; but we think not. It is true that rental values are generally fixed from a calculation of the profits to be derived from the use, but the rental is a fixed, definite value, agreed to be paid, and the bailee assumes the uncertainties as to the profits.

The appellants say: "For an analogous case to the one at bar, in there being an attempt to prove a rental value to property when the facts showed that the property in question had no rental value, the court is referred to *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 365." The case, as we read it, is without a bearing on the question. The defendant agreed to furnish for the coal company an engine of a particular size and make. There was no other engine of the kind that the company could use. There was a delay in the delivery, and the company was compelled to transport its coal by horse-power, as it had before done. The trial court gave the rule "that the measure of damage for the delay was the ordinary hire of a locomotive during the period of delay." The reviewing court gave the rule as the difference between the cost of transporting the coal by horse and by locomotive power, but placed its ruling on the fact that the parties knew there was no other engine to be operated on the track of the company, and could not have had such damage in view in making the contract. It will be seen that the cases are different. If in the case at bar the defendant's boat had been operated at an additional cost by doing the same amount of work during the delay it would be reasonable to say the damage to him was the difference in the cost. But his is an entire loss of use, and the value of such use is the damage, where it is proximate, and not speculative or uncertain.

2. A part of the counterclaim is for loss of time by men kept in readiness by the defendant to do the part of the work belonging to him in adjusting the boilers and machinery, as provided by the contract. On this branch of the case the court gave the following instruction:

"5. If you find from the evidence and under the third and fourth instructions that there was a contract, as set out, between plaintiffs and defendant, and that plaintiffs were in default in carrying out said contract; and if you find that, by reason of such default, defendant was damaged; and if you further find that defendant was in readiness to carry out his part of said contract at the time specified

therein; and at the time he was in readiness to run and operate his boat; and that the boat was necessarily idle during the period of plaintiffs' default by reason of such default—then the defendant would be entitled to recover the ordinary and reasonable rental value of said boat during the time of said default, and such reasonable and necessary amount (if there be any such amount) as he may have been required to pay to any men that he may have employed during said enforced idleness for the purpose of running said boat, if he had any such men in his employ who remained in his employ and idle by reason of such default; and if you find that the defendant had placed himself in readiness to work upon said boat himself at the time specified in the contract for the furnishing of said machinery, and that he necessarily remained idle during the time of such default, if any, of the plaintiffs, and used ordinary diligence to find other employment for that time, you will then further find the fair and reasonable value of his services during the period of such default as part of the damage, if any, which defendant sustained."

Complaint is made of the instruction as stating an erroneous rule of damages; but we discover no error. If because of the breach the defendant lost his or the time of his employees for such time and expense he should be reimbursed. The rule is recognized in *New York etc. Mining Syndicate v. Fraser*, 130 U. S. 611. The instruction fairly protects the rights of the plaintiffs.

A number of other questions are argued, all of which we have examined, and find no prejudicial error. It would serve no good purpose to extend the opinion to present them.

The judgment is affirmed.

DAMAGES—BREACH OF CONTRACT—LOSS OF PROFITS.—Loss of profits may be recovered as damages for the nonperformance of a contract if the loss results directly from the breach of the contract itself: *Wolcott v. Mount*, 36 N. J. L. 262; 13 Am. Rep. 438, and note; *Masterson v. Mayor*, 7 Hill, 61; 42 Am. Dec. 38, and note; *Adams Exp. Co. v. Egbert*, 36 Pa. St. 360; 78 Am. Dec. 382, and note; *Hoy v. Grenoble*, 34 Pa. St. 9; 75 Am. Dec. 628, and note; *Simmons v. Brown*, 5 R. L. 299; 73 Am. Dec. 66, and note; *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718, and extended note thoroughly discussing the subject. In an action for failure to repair an implement the loss of profits is not a proper element of damages unless the defendant knew the circumstances, and contracted with reference to them: *Sitton v. Macdonald*, 25 S. C. 68, 60 Am. Rep. 484, and especially the extended note thereto where the cases on this subject are collected. See also the case of *McKinnon v. McKewan*, 48 Mich. 106; 42 Am. Rep. 458, and note.

HAMILTON-BROWN SHOE CO. v. MERCER.

[84 IOWA, 537.]

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—CUSTODY OF LAW.—Property which has been assigned for the benefit of creditors, and possession of which has been taken by the assignee, is in the custody of the law if the statute under which the assignment was made provides that the assignee shall at all times be subject to the order and supervision of the court or judge, and may by citation be compelled from time to time to file reports of his proceedings and of the situation and condition of the trust, and to proceed to the faithful execution of his duties.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS COMPLETE AND REGULAR ON ITS FACE cannot be attacked in a collateral proceeding.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—An attachment of property which has been conveyed to an assignee for the benefit of creditors cannot be sustained on the ground that persons are falsely designated in the schedule as having claims against the insolvent when the statute provides that "no assignment shall be declared false or void for want of any list or inventory."

George S. Tracy, and Newman and Blake, for the appellant.

Dodge and Dodge, and A. H. Stutsman, for the appellee.

GRANGER, J. It is urged that the assignments of error are not sufficiently specific to justify their consideration. As to some of them the objection is well taken; but as to an instruction refused, and alone to be considered, we think the assignment sufficient.

2. Catherine Byrne is the defendant in this action, against whom the plaintiff company brought the action on an account for six hundred and forty-seven dollars and seventy cents, aiding the proceeding by an attachment on different grounds under the statute, showing a fraudulent disposition of her property. The defendant, Byrne, answered, admitting, in substance, the account of the plaintiff, making certain denials as to the disposition of her property for which the attachment was issued, and averring that on the 30th of November, 1889, she made a general assignment of her property for the benefit of her creditors to John M. Mercer, and on that date surrendered her property to him, and, in effect, denying her ownership of the property because of the assignment. She asked for damage because of the wrongful suing out of the attachment. A demurrer to the answer was sustained, and there was no further pleading by her nor exceptions to the ruling on the demurrer.

John M. Mercer, as assignee, filed his petition of intervention, claiming the goods by virtue of the assignment and his

possession thereof at the time of the seizure by virtue of the attachment. The plaintiff answered the intervention petition, putting in issue the averments as to the assignments, averring that prior to November 30, 1889, Catherine Byrne was engaged in the retail boot and shoe business, and indebted to the plaintiff and others, and that in making the assignment she acted with a fraudulent purpose to aid her relatives in presenting unjust claims against her estate, and to defraud her just creditors. Disregarding the question of fraud, the evidence without dispute shows that John M. Mercer was, before the commencement of this suit, duly appointed, qualified, and acting as the assignee of the estate of the defendant, and as such was in possession of the goods seized by virtue of the attachment. The intervenor asked the following instruction, which the court refused, and the refusal is the basis of an assignment on this appeal: "Plaintiff in this case, the Hamilton-Brown Shoe Company, is making a collateral attack upon the assignment, and upon assignee's title to said property. This cannot be done, and your verdict must be for the intervenor."

The question thus presented meets with earnest contention by the parties, and is certainly important as bearing upon the general practice of the state. The briefs of counsel and an examination of the cases cited indicate a decided conflict of authority on the question in other states; but it is largely accounted for because of the different statutory provisions under which the decisions were made. After a careful examination we reach the conclusion that the court erred in refusing the instruction, and will state our reasons therefor. It is likely true, as counsel seem to think, that much depends upon whether or not the property, when taken under the attachment, was in custody of the law, and if so, much of the contention in support of the present proceeding is removed. See, in support of such a rule, *Lehman v. Rosengarten*, 23 Fed. Rep. 642, which case cites *Covell v. Heyman*, 111 U. S. 176, *Krippendorf v. Hyde*, 110 U. S. 276, and *Freeman v. Howe*, 24 How. 450. Whether property is in custody of the law or in that of a trustee, so as to be liable to collateral attacks, depends largely upon the statutory provisions under which the trustee acts in the discharge of his duties. By the appellee we are cited to *Wait on Fraudulent Conveyances*, 2d ed., section 816, wherein it is said: "The property in the possession of an assignee is not *in custodia legis*, for the reason that

the assignee is not an officer of the court, but is a trustee, bound to account according to the terms of the instrument; and his authority depends upon the validity of the assignment, and is not conferred by the court." This may be said to be a fair statement of the facts under which, and the reasons why, such property is said not to be in the custody of the law. Even under such a statement the authorities are not harmonious. The text above quoted takes for its support *Adler v. Ecker*, 1 McCrary, 256, 2 Fed. Rep. 126, and the decision is based on the Minnesota statutes. The supreme court of Minnesota in the case of *Second Nat. Bank v. Schranck*, 43 Minn. 38, in construing the same statute, says: "When the assignment is perfected, and to some extent at least prior thereto, its entire subject matter—all that is involved—including the assigned estate, passes under the jurisdiction of the district court *ipso facto*, immediately, and without any further act, the assigned property is in the custody of the law." The same rule is announced in *Wilson v. Aaron*, 132 Ill. 238, and in *Scott v. McDaniel*, 67 Tex. 315. The conclusions are announced under statutes certainly not more favorable to such a conclusion than ours. Our code contains this somewhat unusual provision (section 2123): "The assignee shall at all times be subject to the order and supervision of the court or judge, and the said court or judge may, by citation and attachment, compel the assignee, from time to time, to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by this chapter." The law, in effect, determines the entire course of procedure of the assignee in the management and disposition of the property as far as the law could well direct it; certainly as much so as in cases of receivers, administrators, etc., where the appointment comes directly from the court.

We think, however, that it is not alone the source from which the appointment comes that is to determine the custody of the property, whether that of the law or the trustee, but the extent of the law's supervision and control of the property by virtue of the assignment. In this respect, under our law, the assignee has no independent authority. The limitation of our law upon the common-law assignments leaves little room for an assignor to invest his assignee with discretionary power, and particularly so as to procedure and distribution, which embrace the substantial purpose of such

an assignment. As illustrating the rule announced by Mr. Wait, that such property is not in the custody of the court, he says, in the section cited, speaking of the assignee: "He distributes the proceeds of the estate placed in his care according to the direction and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor." Under our statute the assignee "distributes the proceeds of the estate placed in his care" according to the dictation of the law. The primary authority of the assignee is derived from the assignment, for it is voluntary; but, when made, it puts in operation the provision of the law, which, through the agency of the court, guides, guards, and controls the entire administration of the estate. We think, without doubt, that under our statute, where an assignment is regularly made, and the assignee is in possession of the property for the settlement of the estate, such property is in the custody of the law; but we are not to be understood as holding that an assignment, invalid or void, as contravening the provisions of the statute, will operate to place the assigned property in such custody. This conclusion is practically conclusive of the question presented by the assignment. In the Minnesota, Illinois, and Texas cases before cited the holding is emphatic to the effect that such a proceeding is collateral, and cannot be sustained. In the Minnesota case it is said in a *syllabus* by the court: "A deed of assignment, complete and regular on its face, purporting to have been made by virtue of the provisions of chapter 148, General Laws, 1881 (the insolvency act), although actually unwarranted by the existence of such facts as would alone justify such an assignment, cannot be attacked and assailed in a collateral proceeding."

It is, however, urged that the attachment proceeding has support in the decision of this court; but we think there is no case where the question has been presented and ruled favorably to the claims of the appellee upon similar facts. We do not intend, by holding that this assignment cannot be attacked collaterally, to interfere or question the former adjudication of this court under section 2115 of the code, which provides that "no general assignment of property by an insolvent, or one in contemplation of insolvency for the benefit of creditors, shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their re-

spective claims." In the case of *Burrows v. Lehndorff*, 8 Iowa, 96, and in a long line of decisions subsequently made, it is held that a creditor may disregard such an assignment, treat it as void, and proceed to attach the property the same as if no assignment had been made. But the case at bar is not like the cases referred to. It is not claimed that there is any preference given to any creditor. The assignment on its face purports to be an assignment for the benefit of all the creditors. The mere designation of persons as creditors in the schedule, who may not have valid claims, does not render the assignment void. It is expressly provided by section 2124 of the code that "no assignment shall be declared fraudulent or void for want of any list or inventory," and surely it ought not to be declared void because creditors are listed who do not have valid claims. To sum up the whole case: The plaintiffs have ample protection against the claims complained of under section 2121 of the code, wherein they are authorized to appear and contest every claim that is filed. They cannot be allowed by attachment to gain the advantage of being declared preferred creditors by alleging that some of the claims listed are fraudulent. It appears from the act that there are some seventeen other creditors, whose claims are not questioned, amounting in the aggregate to some three thousand dollars. If the claim of the plaintiff should be preferred by attachment to such creditors, it would acquire an unjust advantage in the distribution of the results. This cannot be allowed. The instruction asked, or one of like import, should have been given. This holding renders it unnecessary to consider other assignments on the intervenor's appeal.

8. One Lyman Cook was also an intervenor, and asked against the defendant Byrne a judgment for rents which he claimed to be a preferred lien on the goods attached by virtue of a landlord's lien. The court gave judgment against the defendant for the amount of three hundred and sixty-two dollars, and preferred the lien therefor to that of the attachment of the plaintiff. The plaintiff company alone appeals from the order. No question is made as to the correctness of the judgment against the defendant. The intervention by Cook presented the question of a priority of liens with the plaintiff company. The effect of our holding is to dismiss the plaintiff's attachment, and hence it has no such interest as will permit it to question the correctness of the judgment in favor of intervenor Cook.

The judgment, on the plaintiff's appeal, is affirmed; on the appeal of the intervenor, Mercer, it is reversed.

IN CUSTODIA LEGIS.—According to the Iowa statute under which the leading case was decided an assignee for the benefit of creditors occupies an analogous position to that of a receiver, since he is subject to the order and supervision of the judge at all times, so the rule that property in the hands of a receiver is in the custody of the law applies to this case: *Texas etc. Ry. Co. v. Lewis*, 81 Tex. 1; 26 Am. St. Rep. 776; *Adams v. Haskell*, 6 Cal. 113; 65 Am. Dec. 491, and note; *Hagedorn v. Bank*, 1 Pinney, 61; 39 Am. Dec. 275; *Albany City Bank v. Schermerhorn*, 9 Paige, 372; 38 Am. Dec. 551.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—COLLATERAL ATTACK.—An assignment in insolvency complete and regular on its face, purporting to have been made in accordance with the statute, cannot be attacked and assailed in collateral proceedings: *Second Nat. Bank v. Schranck*, 43 Minn. 38.

TROE v. LARSON.

[84 IOWA, 649.]

MANDATORY INJUNCTION MAY ISSUE TO COMPEL DEFENDANTS TO REMOVE

A DAM erected by them across the outlet of a lake whereby the natural flow of the waters from the lake are retarded and the land of the complainant overflowed, though such dam was constructed several years before the commencement of the suit and the defendants have since done nothing towards its maintenance or repair, nor asserted any right to maintain it, nor are they the owners of the land on which it is situated. If the dam was built with the knowledge and assent of the owner of the land, and he is not shown to have any interest that will be subserved by its continuance, the court will assume that he will permit the defendants to remove it.

INJUNCTION.—AN INJURY IS IRREPARABLE so as to justify an injunction against its continuance if it is one for which there can be no adequate compensation in money, or which, if continued, may become the foundation of adverse rights, or occasion a multiplicity of suits, or materially lessen the enjoyment of property by its owner.

SUIT to compel the defendants to remove a dam erected by them upon the lands of one Gulson, in 1886, across the mouth of Silver lake, whereby the lands of plaintiffs adjacent to such lake are caused to be overflowed. Judgment for the plaintiffs; defendants appealed.

Pickering and Hartley, and Cliggett and Rule, for the appellants.

L. S. Butler, and Cummins and Wright, for the appellee.

GRANGER, J. 1. The decree of the district court restrained the defendants from maintaining the dam, and ordered that

they should remove the same within sixty days from the entry of the judgment; and the appellants contend that the court should not have so ordered, because it was a "past and completed act, and not ground for a preventive or mandatory injunction."

We are cited to *Cole v. Duke*, 79 Ind. 107. The case is a good illustration of the general rule contended for, but is not applicable to the facts of this case. In that case the action was to enjoin a city clerk from issuing an order for the payment of an allowance made by the city council, and before process issued the order had issued and been paid, and the court held that the wrong "could not be corrected by an injunction, as its purpose is to prevent, and not to correct, wrongs." A mandatory writ was not sought nor in any way involved in the case. Nor is *Wangelin v. Goe*, 50 Ill. 459, an authority for the appellants' position in this case. Both of the cases recognize the rule that injunction is a preventive remedy, and that is the remedy sought in this case. It is not to correct a wrong of the past, in the sense of redress for the injury already sustained, but to prevent further injury. The injury consists in the overflow of the lands of the plaintiff. It was not alone the building of the dam that caused the injury, but its maintenance or continuance, which is a part of the act complained of; and its maintenance can only be estopped so as to prevent the injury by its removal. The removal of the dam, wrongfully constructed, is necessary for and incidentally involved in the preventive redress which the law authorizes, and no technical application of a rule as to a mere method of procedure should be allowed to defeat so plain a rule of justice.

It is said that the cases in which mandatory injunctions have issued are those of continuing trespasses or nuisances in which the defendant owned the land on which the nuisance was kept, or was active in continuing a trespass or nuisance on the land of the complainant; and it is sought to distinguish this case, because these defendants have not, since the building of the dam, done any act or asserted any right to maintain the dam. The dam came into being, and continues to be, because of their act of construction. The injury or trespass results from the wrongful act of construction, and the act continues or is coexistent with the trespass. While the dam continues as the result of their act of construction, they may be said in legal contemplation to be every day

maintaining it. We are cited to no authority announcing a contrary rule, and it certainly accords with reason.

2. It is earnestly contended by the appellants that this action cannot be maintained because the trespass complained of is not irreparable in its nature. Just when an injury will be "irreparable" within the meaning of the law, so as to justify a writ of injunction, it is perhaps not the province of a general rule to determine, because of the great variety of facts, under which the allegation is made. It may, however, be said not to be so comprehensive in its scope as to embrace all injuries for which there could be a money compensation. The compensation must be adequate, not against the demands of natural justice. The rule is applied to threatened injury to property: *High on Injunctions*, sec. 702. In the same section: it is said: "So, where the trespass complained of is repeated or continued in the nature of a nuisance, or when the wrongful acts continued or threatened to be continued may become the foundation of adverse rights, and may occasion a multiplicity of suits to recover damages, the case presents such equitable features as to entitle complainant to the aid of such injunction." In *Gould on Waters*, section 509, under the subject of "Irreparable Injury," it is said: "The court is not governed by questions of pecuniary value, but will remedy and prevent an injury which it may reasonably be supposed would materially lessen the enjoyment of property by its owner." This case is within the scope of the rules thus announced. To what extent the injury will extend, how long the dam would be maintained, when the rights of the plaintiff could be determined by resorts to actions at law, are matters of so much uncertainty and of probable litigation that equity and justice demand a speedy and conclusive determination of the questions. It may further be said that courts of equity have long taken cognizance of actions for back flowage of water, the obstruction of watercourses and the diversion of streams: *Angell on Watercourses*, sec. 445.

3. Gunder Gulson is the owner of the land on which the dam is built, and it is claimed that the defendants would be trespassers in going onto the land to remove the dam. The dam was built with the knowledge of Gulson, as shown by his evidence; and his assent, expressed or implied, may be assumed upon the record before us, not only for its erection but its continuance; and, whatever might be the legal effect of an objection by Gulson to a removal under the order of the

court, and how far such an objection would excuse obedience to the order, we need not now consider. We may rather assume that the license before granted will be continued in the fulfillment of a legal obligation by the defendants. We are not informed that Gulson has any interest to be subserved by the continuance or abatement of the dam.

4. Upon the question of fact whether or not the dam raised the water in the lake above the natural stage there is a large mass of testimony for and against the proposition. No reasonably limited quotation could serve to show the evidence from which the fact is to be found. The lake is meandered, and the title thereof in the public. That the dam raises the water in the lake above the natural height, or that to which parties have a legal right to maintain it, resulting in a damage to the plaintiff by the overflow of his land, is not to our minds a doubtful question. The difficult question to determine is the height to which the bed of the outlet to the lake may be kept, so as to preserve the rights of parties against too high or too low water. The decree of the district court prohibits the defendants from "erecting and maintaining any dam or obstruction in said outlet." The present dam is made of a log, some twenty-six feet in length and some ten or twelve inches through at one end and eight inches at the other. The testimony is not uniform on this point. Above the log was placed brush, sand or earth, so as to raise the top of the dam somewhat above the top of the log. It is likely the effect of the dam is to raise the water from twelve to sixteen inches above what it would be if the bottom of the log was the height of the bed of the channel. There is some evidence tending to show that the ground where the ends of the log rest is higher than the ground between, and that water would, if not obstructed, run under the log. Considerable uncertainty attends the finding of such facts from the evidence, but our conclusion is, upon the record, that, if the channel of the outlet should be kept at the height of the bottom of the log, it would best protect the rights of all parties. The terms of the present decree would not permit this, but would prevent any dam or obstruction in the outlet. It is possible that the bed of the outlet is not lower than the bottom of the log, and, if not, the removal of the dam would effect the desired purpose. We think the decree should be so modified as to not prevent the bed of the outlet from being kept at the designated height—that is, the height of the bottom of the log.

5. It is said that the testimony shows that the defendant Lars Larson did not help to erect the dam or to maintain it, and that the decree as to him is without support. This view of the appellant is correct, and as to the defendant Larson, the bill should be dismissed. There is no other question that we need consider, and the decree of the district court, with the modifications suggested, is affirmed.

INJUNCTION—MANDATORY TO COMPEL REMOVAL OF OBSTRUCTION IN STREAM.—A mandatory injunction may issue to compel the removal of obstructions placed in a stream so as to retard the flow of the water as it was before such obstructions were built: *Wharton v. Stevens*, 84 Iowa, 107, ante, 296, and note.

INJUNCTIONS—IRREPARABLE INJURY.—Injury is irreparable which cannot be measured by any pecuniary standard: *Dudley v. Hurst*, 67 Md. 44; 1 Am. St. Rep. 368, and extended note; *Puckette v. Hicks*, 39 La. Ann. 901; 4 Am. St. Rep. 242, and note; *Lattier v. Abney*, 43 La. Ann. 1016: See also note to *Jansville v. Carpenter*, 20 Am. St. Rep. 125.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

**BANGOR SAVINGS BANK v. NIAGARA FIRE INSUR-
ANCE COMPANY.**

[85 MAINE, 68.]

ARBITRATION—CONSULTING THIRD PERSONS.—Appraisers appointed to ascertain the loss resulting to insured property from a fire may consult a third person about any matter in controversy and may, if they see fit, act upon the opinion of that person in forming their own judgment and in making the award. All that is necessary is that they should form a judgment of their own, and not adopt nor absolutely follow the opinion of the person consulted in contravention of any opinion of their own.

ACTION on a policy insuring against loss by fire. The defendant pleaded that the damage suffered by the fire had been submitted to appraisers and by them estimated at nine hundred and twenty-seven dollars and forty cents. The trial court ruled out the award altogether and the jury returned a verdict in favor of the plaintiff for one thousand and ninety-five dollars and thirty cents.

O. P. Stetson, for the plaintiff.

Baker, Baker and Cornish, for the defendant.

WHITEHOUSE, J. *Assumpsit* on a policy of insurance against loss or damage by fire to an amount not exceeding two thousand dollars on the hotel building known as the Bangor House. The contract in suit was one of eight policies issued by different companies on the same property, amounting in the aggregate to fifteen thousand dollars.

The house was damaged by fire on the fifth day of May, 1889, and it was not in controversy that the policy in suit was

valid, and that the defendant corporation was liable to pay the plaintiff its proportional part of the damage, according to the terms of its contract. The amount of damage which the plaintiff was entitled to recover, and the mode of its adjustment, were the only subjects of contention between the parties.

The policy in suit contains the following, among other stipulations: "This company shall not be liable beyond the actual cash value of the property at the time, if loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided, and the amount of loss or damage having thus been determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss having been received by this company in accordance with the terms of this policy."

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss."

"The loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

Having reference to these provisions of the policy, but before any disagreement had in fact arisen with respect to the amount of the damage, the parties entered into a written agreement in which it was stipulated that two appraisers named, duly selected, one by each party (together with a third person to be appointed by them if necessary, to decide

upon questions of difference only) should "appraise and estimate at the true cash value the damage by fire to the property," etc. Failing to agree, these appraisers selected an umpire and the three performed the duty to which they were appointed and made and signed a unanimous report appraising the aggregate damage at six thousand nine hundred and fifty-three dollars and fifty cents. Proofs of loss were accordingly signed and sworn to by the insured and delivered to the agent of the defendant company, claiming from the company the sum of nine hundred and twenty-seven dollars and forty cents, being its proportional part of the aggregate damage as fixed by the report of the appraisers. Subsequently, however, notice was sent to the defendant by the insured that these proofs of loss were withdrawn.

Thereupon the defendant pleaded in defense a "legal and valid award in writing," respecting the amount of damage, and introduced in evidence the written agreement for submission, the report or award signed by the original appraisers and the umpire, and the "proofs of loss" above described. A draft sent by the defendant company in payment of the sum claimed in the proofs of loss was also offered in evidence by the defendant's counsel, for the purpose of showing its acceptance of the proofs of loss, and compliance on its part with the provisions of the policy.

But it was contended that the award was not valid and binding upon the plaintiff because it was apparent on the face of the report that it did not conform to the terms of the submission, and because it further appeared from extrinsic evidence, as it was claimed, that the umpire did not confine himself to the decision of questions of difference only, in the manner contemplated by the submission; and that with respect to certain branches of the appraisal he had not acted on his own judgment, but on the judgment of other persons consulted by him without the knowledge of the plaintiff.

Although the award made by the appraisers may be regular and sufficient in form, it may undoubtedly be impeached for fraud or misconduct on the part of the appraisers, or on other grounds which vitiate all awards. On the other hand, it is obviously competent for the parties to modify or waive any provisions of their written contract by a subsequent mutual agreement not in writing: *Wiggin v. Goodwin*, 63 Me. 392; *Goss v. Nugent*, 5 Barn. & Adol. 65; *Hall v. Norwalk Fire Ins. Co.*, 57 Conn. 105. The last-named case is precisely

in point, and the court say: "The provision in the policy referred to was not designed to prescribe, and it does not intend to prescribe, any form of submission. It only gives certain leading features of the submission, which were in fact substantially complied with. . . . But the capacity of the parties to contract could not be restricted by the policy so that they could not waive its requirements and make a submission to suit themselves, provided, of course, it was not otherwise unlawful."

So far, therefore, as there is any material difference respecting the duties of the appraisers or the umpire, between the provisions of the policy and the terms of the written agreement for a submission, the former is presumptively superseded by the latter, and in such a case the duties of the appraisers and of the umpire are to be ascertained, and their conduct examined with reference to the terms of the submission actually signed by the parties.

With respect to the conduct of the appraisers, it appears that Willard Cutter, of Bangor, the umpire, had resided in that city for more than forty years, had been a contractor and builder for thirty years, and was familiar with the prices of labor and materials in Bangor. In regard to his action as an appraiser he testified as follows: "I come to painting now. I partially figured that myself, and then I thought I would get a painter to figure it. . . . To a certain extent this is what I got from Marston and Gorham. These are the figures which I adopted as my own." He further testified expressly that the figures made up by him after obtaining this information were his own judgment of the actual damage to the property. There was no claim that Mr. Cutter had not acted throughout with entire disinterestedness, and from an honest purpose and desire to reach a just and correct appraisal. His estimate of the aggregate damage had been adopted by the original appraisers as the amount of the unanimous award which was made and published.

Upon this branch of the case the presiding judge said to the jury:

"I am requested to give you this instruction: 'That an appraiser in the case here has the right, on any special branch of the appraisal, as an appraiser, to make use of the judgment of another skilled in that special branch, upon whom he can depend, and the valuation of that person is his if he chooses to adopt it.' I cannot give you that instruction. I do not

think I can change the instruction I gave you upon that subject. If after getting an opinion, if after getting an estimate, the appraiser does not treat it as his own judgment, but acts upon it as the judgment of the other party, I have said to you it would not be binding. But he may, after getting the opinion of another, act upon his own judgment, uninfluenced, perhaps unaffected entirely, by the opinion of another. But what I call your attention to is the adoption by a referee, or an appraiser, of an estimate or judgment of a third party where he has none of his own, and where he acts upon the judgment of a third party as the basis of his own action, without forming an intelligent judgment of his own."

This instruction was also requested: "That an appraiser or arbitrator may call in the aid of a third person skilled in a special branch embraced in the appraisal, and may give to the estimate of such third person such weight and credence as he sees fit, even to the point of founding his judgment upon that estimate, provided he adopts that as his real judgment." And the court said: "I do not see any necessity of instructing you further upon this branch of the case."

Touching this question, the early case of *Emery v. Wase*, 5 Ves., Jr., 846, is a leading and important one. It involved an agreement to sell an estate at a price to be fixed by arbitration, and it was objected that the arbitrator did not exercise his own judgment in regard to the value of certain timber. But the Master of the Rolls said: "That alone is not sufficient to prove an award bad; for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he chooses to adopt it." On appeal Lord Eldon concurred in this view: *Emery v. Wase*, 8 Ves., Jr., 504. In *Soulsby v. Hodgson*, 3 Burr. 1474, the arbitrators, being unable to agree, chose an umpire, and acted with him. The only question was whether the umpirage was duly made according to the power given to the umpire, or whether it was vitiated by the arbitrators joining in it. The court were said by Lord Mansfield to be "unanimous and clear that this was the umpirage of the umpire only. He was at liberty to take what advice or opinion of assessors he pleased." In *Anderson v. Wallace*, 3 Clark & F. 26, it was held that by adopting in terms the opinion of a third person, consulted by them, the arbitrators do not constitute him an umpire, but make his opinion their own, and their award cannot be impeached on that ground. In his work on arbitration, 3d ed.,

p. 199, Mr. Russell says: "The cases are numerous to show that an arbitrator may submit a material question affecting the merits of the case to another, and after hearing his opinion adopt it as his own, upon the credit which he gives to the judgment and skill of the person to whom he refers."

In Morse on Arbitration, p. 169, after citing numerous authorities the author says: "The theory is sufficiently plainly developed in these English cases that the arbitrator may, for his own information and guidance, ask information from persons whose capacity to form an accurate opinion concerning the subject matter he relies upon; that the statements thus obtained by him are to be treated as evidence or as aids by which he may make up his own opinion. He may give them such weight and credence as he sees fit, even to the point of founding his judgment upon them; but it is essential that he should form his judgment, and not adopt and follow them absolutely, blindly, or in contravention of an actual opinion of his own."

Referees may also "make inquiry abroad to ascertain for their own satisfaction the price of work, or the truth of any other matter which may be said comparatively to be of a public nature. This, it is said, so far from being irregular, would be highly commendable: Morse on Arbitration, 187. See also *Vannah v. Carney*, 69 Me. 221.

But it is unnecessary to the decision of the question here raised, to adopt in its full extent the doctrine apparently established by these authorities relating to the ordinary submission of an existing controversy to referees. The question here does not arise in connection with a general submission to arbitration.

It was a proceeding for the ascertainment of a single fact or the settlement of a particular question in the chain of evidence, and not originally designed to terminate the whole controversy. In the absence of definite knowledge as to the extent of the loss, and in anticipation of a possible disagreement, it was mutually agreed that the damage should be "ascertained and estimated" by competent and disinterested appraisers, selected with special reference to their knowledge, skill, and experience in regard to the subject matter. This duty is to be performed by the appraisers mainly by the aid of a personal examination of the premises and an application of their personal knowledge. They are not expected to hold a formal session of court to determine an entire controversy after hearing pleadings, evidence, and argument. Their pro-

ceedings resemble more the process of taking expert testimony. Whether mere valuers or appraisers thus appointed for such a purpose can be deemed arbitrators in any proper sense or for any purpose there is no occasion to decide. The authorities are not in harmony upon the subject: See Morse on Arbitration, 38, 42, and cases cited. It is not necessary to follow the different courts in their ingenious efforts to trace, for all cases, a line of distinction between a mere appraisal and an ordinary submission to arbitration. The result may be that such appraisers are properly considered arbitrators for some purposes, but not in all respects. All are invested with *quasi* judicial functions, which must be discharged with absolute impartiality, without the improper interference of either party, or undue influence from any source. But appraisers may be said to act in the twofold capacity of arbitrators and experts. In their character of experts they not only give effect to opinions based directly on their personal experience and knowledge, but also opinions founded in some measure upon information which may not be so direct and original as to be competent in itself as primary evidence. A witness called as an expert is expected, before testifying, to refresh his memory and confirm his judgment by an examination of authorities and conference with other experts. The umpire did precisely this, and no more, in the case at bar. After making an examination of the premises and certain estimates of his own, he made inquiry of an experienced and disinterested painter respecting the cost of painting. His conclusions may have been affected and modified to some extent by the information thus obtained, but he declares that his report correctly represented his own judgment. He was not only unconscious of any impropriety in seeking this information, but was evidently engaged in a careful and conscientious effort to reach a just and correct appraisal. So far from being improper and illegal, his conduct was entirely praiseworthy. Any rule which would prohibit an appraiser from thus qualifying himself to do justice between the parties, so far from being an aid in the ascertainment of truth, would be an essential obstacle to it. Two or three appraisers with personal knowledge so definite and comprehensive as to embrace all the details of the damage could not ordinarily be found. Either a court must be held to hear evidence, or a separate appraiser appointed for each of the numerous special branches of an appraisal. Such a rule

would be inconsistent with the approved and established methods of conducting important departments of business, and tend to defeat the very object contemplated by the parties in providing for an appraisement.

The instructions requested by the defendant's counsel upon this point were evidently drawn with direct reference to the authorities cited, and appear to be in harmony with the principles here enunciated; but the language of the charge upon this branch of the case, which was doubtless inadvertently used, taken in connection with the refusal to give the requested instructions, was calculated to give the jury an erroneous impression of the law respecting the conduct and duty of an appraiser under the circumstances disclosed by the evidence in this case.

Exceptions sustained.

PETERS, C. J., WALTON, VIRGIN, EMERY, and FOSTER, JJ., concurred.

ARBITRATION—CONSULTING THIRD PERSONS.—An award of arbitrators will not be set aside upon the ground that they consulted with a person not an arbitrator, if it appears that they acted on their own judgment in making their determination: *Simons v. Mills*, 80 Cal. 118, cited in the note to *Brush v. Fisher*, 14 Am. St. Rep. 518.

SIMPSON v. BLAISDELL.

[85 MAINE, 199.]

DEEDS, IDENTIFYING LAND AFTER THE CONVEYANCE IS MADE.—When a tract of land intended to be conveyed is not identified in the conveyance, the parties may afterwards survey and stake out the land conveyed, and if the grantee then takes possession, this ascertains the grant and gives effect to the deed.

CONVEYANCE OF ONE-HALF AN ACRE OF LAND NEAR THE WHARF, or at the wharf, and describing the wharf, is not void for uncertainty, if the parties, either before or after making the conveyance, survey, or stake out the parcel from the grantor's surrounding land, or the grantee takes possession of the particular parcel with the acquiescence of the grantor.

CONVEYANCE—DECLARATIONS TO SHOW LOCATION OF LAND CONVEYED.—If land conveyed in a deed is described therein as a one-half acre tract near the wharf or at the wharf, the declarations of the grantor made subsequently as to the boundaries of the land so conveyed are admissible in evidence against one claiming title under him.

REAL action to recover a tract of land. Verdict for the plaintiff.

Deary and Higgins, for the plaintiff.

Wiswell and King, for the defendant.

PETERS, C. J. The demandants claim title to an undivided sixth of a certain half-acre of land which Joseph Blaisdell undertook, by his deed given in 1838, to convey to George Hinman and Samuel P. Donnell, which deed contains the following description:

“Beginning at a pine tree spotted on four sides near the southeast corner of the Card lot (so called); thence running west twelve degrees north fifty-six rods to a birch tree spotted on four sides; thence running north twelve degrees east twenty rods to a hemlock stump spotted on four sides; thence running east twelve degrees south fifty-six rods to a stump spotted on four sides near a large rock; thence south twelve degrees west twenty rods to the point of beginning, and containing seven acres, more or less. Also a road from said land to the shore in the place that will best convene the said Hinman and Donnell, together with the wharf built by Wooster and Sanborn in the year 1836, together with all the privileges and appurtenances thereunto belonging. Also one-half of an acre of land near the wharf or at the wharf.”

The seven-acres parcel was purchased for a granite quarry upon it. The road was for the convenience of transporting granite from the quarry to the shore; and the half-acre was undoubtedly intended to be a place for depositing, according to the needs of the quarrying business, granite at the shore. The controversy here is over the parcel of half an acre; the defendant contending that the deed, so far as affecting that parcel, is inoperative and void for the want of sufficient description, and that the insufficiency cannot be supplied by any oral evidence. The question presented here is to be considered precisely as it might have been had it arisen between the original parties to the deed, inasmuch as the present parties make their claims respectively by inheritance through and under him.

In approaching the task of making effective, if we legally can, the apparently uncertain description in this deed, we must remember that the law desires to sustain the validity of this class of instruments wherever it can. Says Mr. Powell, the writer on this subject: “The law is curious and almost subtilizes to find reasons and means to make assurances and deeds inure according to the just intent of parties, and to

avoid wrong and injury which, by abiding by rigid rules, may be brought out of innocent acts": See 3 Washburn on Real Property, 5th ed., *621. Said Barrows, J., in *Cilley v. Childs*, 73 Me. 130: "Moreover, it is well-settled law that a deed shall not be held void for uncertainty, but shall be so construed, whenever it is possible, as to give effect to the intention of the parties, and not defeat it; and that this may be done whenever the court, placing itself in the situation of the grantor at the time of the transaction, with knowledge of the surrounding circumstances and of the force and import of the words used, can ascertain his meaning and intention from the language of the conveyance thus illustrated."

The questionable description in the deed before us is by no means a blank. It fixes the locality "at or near the wharf." It is not a roving half-acre. The purposes for which it was purchased, in connection with the use of the quarry and road and wharf, may indicate its proximate location, as it would be a half-acre adaptable to the use intended to be made of it. The original parties to the deed, long ago deceased, must have understood just what territory was supposed to be conveyed.

Now, there were two ways in which the parties might have consummated the conveyance of the half-acre according to their intention. They could survey out the parcel from the grantor's surrounding land, and then make the deed of it, or could first make the deed and survey out, and identify the parcel afterwards.

The demandant's position is that one or the other of these methods of making certain the location of the parcel was adopted. While either mode would be legitimate, the indications are that after the deed was delivered the grantor assigned a certain half-acre to the grantee, which the latter accepted; or that the grantee appropriated to himself a certain half-acre with the acquiescence of the grantor, possession and occupation following afterwards. Suppose that Hinman, after receiving his deed, had selected out a half-acre, and entirely covered it with permanent structures, or had surrounded it with a permanent fence, the structures or fence remaining to this day, and the grantee being in possession all the time, could any possible criticism defeat the title of the latter? And would not the result be the same even if there were no evidence of any assignment or appropriation of the half-acre more than the fact of such demonstrative possession and oc-

cupation? The supposed cases would be strong illustrations of the principle involved, but the same result may be attained upon less cogent but still satisfactory evidence, and the principle would be the same. What the entire testimony was on that point we are not informed, as the case is not fully reported; nor do we know whether there has ever before this been any question as to the true location of the half-acre lot.

These principles are illustrated, either partially or fully, by many decided cases which sustain the general proposition, quoted by the demandant's counsel from Washburn on Real Property, as follows: "Thus, to sell ten acres of land without describing any boundaries to the same would be void; but if the parties then go on and stake out that quantity of land, and the grantee takes possession of it, it ascertains the grant and gives effect to the deed." The case of *Farrar v. Cooper*, 34 Me. 394, is much like the present case, and directly supports the demandant's contention.

The defendant excepts to the admission of the testimony of the demandant's witness, Ambrose Simpson, upon which probably the verdict in favor of the demandant largely depended. His story, in substance, was, that in 1857 he and his brother were purchasing of the same Joseph Blaisdell land contiguous to the half-acre in question, and that they called upon Blaisdell to show them the location of the half-acre lot; that thereupon Blaisdell procured a surveyor to measure the lines about it, he (Blaisdell) indicating the lines to the surveyor in presence of the witness; and that the half-acre so shown and measured is identical with the premises demanded in this suit. No stakes were set at the time or found in the ground, but certain natural boundaries were pointed out by Blaisdell. This evidence was properly received as an admission by Blaisdell that the land had been formerly located by himself and his grantees. Counsel for the defense expresses the opinion that it would be hazardous to allow titles to depend for their validity upon such ephemeral evidence. But that must be a question rather for the jury than the court. It was evidence of a clear and unqualified admission of a party against his own interest, accompanied by very significant acts.

The charge of the judge on this point is excepted to, but we do not perceive anything in it legally objectionable. In his interpretation of the law and evidence of the case the judge made the following remarks:

"Now as to the boundaries of this half-acre lot—for the purposes of this trial I give you the rule intimated by counsel that, where land is given in this indefinite way, that is, where its location is generally indicated in the deed, but its precise limits not defined, then if we find that at that time or thereafterwards the parties themselves defined its limits in any way, that will control. And that fact may be shown by outside evidence to aid us in determining the meaning of the deed. And we here come to a question of fact for you, that is, whether or not at the time of this conveyance or afterwards this half-acre of land was defined—I do not mean run out by a surveyor, or chained out, or stakes put down, but as between the parties to this conveyance, was the half-acre of land ever defined? It may be defined in various ways. It can be defined by the parties going down with the surveyor, and surveying it off, and putting down marks. It can be defined in other ways perhaps. It need not be done necessarily by both parties being upon the ground at the time. If George Hinman went upon the land himself and began to use a half-acre—a well-defined half-acre—marked it out by piling paving all over a well-defined half-acre, or in any other way; if he began to use it in that way so as to make it clear and distinct that he was appropriating a certain specific half-acre under his deed; and the grantor knew it, and saw it, and acquiesced therein for a number of years—that would be evidence from which the jury might infer that it had been in that way marked out and appropriated; but it would not be conclusive. The plaintiffs say that under this deed the evidence should convince you that after the deed was given, either the parties together, or Mr. Hinman, with the consent of Mr. Blaisdell, Sr., by mutual agreement, marked out and defined this half-acre.

"Now, that is for you. If you come to the conclusion that it never was in any way marked out, either by occupation or in any other way, but was left for all time as it was first written—simply a half-acre lot—then you cannot say properly that this lot now in demand in the writ is that lot. You will have to say, so far as that is concerned, that the plaintiffs did not have a better title than the defendant. Whether or not the lot described in the writ as the half-acre lot is conveyed by the deed depends upon whether you find as matter of fact that it was in some way marked out by the parties afterwards, either by both together or by the grantee, the

grantor knowing it and assenting to it impliedly. If you find that there was such a marking out then the plaintiffs have a *prima facie* title to both lots."

Exceptions overruled.

WALTON, VIRGIN, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

DEEDS—IDENTIFYING PREMISES AFTER CONVEYANCE.—Evidence of extrinsic facts is admissible to identify the premises sold: *Herrick v. Merrill*, 37 Minn. 250; 5 Am. St. Rep. 841. A grantee has his election in case of uncertainty in the description of a boundary to make the same certain by a survey of the premises: *Armstrong v. Mudd*, 10 B. Mon. 144; 50 Am. Dec. 545, and note. See note to *Stone v. Clark*, 35 Am. Dec. 373.

DEEDS—DECLARATIONS TO SHOW LOCATION OF LAND CONVEYED.—Where the language used in a deed to describe the premises meant to be conveyed is ambiguous or insufficient, the subsequent acts or declarations of the parties showing the construction put upon the words of the description by them may be resorted to; note to *Stone v. Clark*, 35 Am. Dec. 373. The declarations of a former owner of the land under whom the plaintiff claims is inadmissible to show that the bed of a river which was the boundary has changed: *Taylor v. Green*, 29 S. C. 292; 13 Am. St. Rep. 724.

HURD v. BICKFORD.

[35 MAINE, 217.]

CONSIDERATION WHICH WILL SUPPORT A SALE OF PROPERTY so as to cut off the rights of one from whom the seller acquired it by fraud must be something more than the discharge of a debt that revives when the consideration for its discharge fails.

FRAUD—PROPERTY PROCURED BY PURCHASE OR, IN PAYMENT OF AN ANTECEDENT DEBT.—If property is procured by fraud, the owner is not precluded from recovering it from one to whom it has been sold, if the latter made payment therefor with indebtedness due to him from his immediate vendor.

TROVER for a horse and sleigh which the plaintiff had sold and delivered to one Gross under a purchase fraudulent as against the plaintiff. Gross was indebted to the defendant before the fraudulent purchase was made, and thereafter gave his note for the amount of such indebtedness. He then sold the horse to defendant and accepted the note in payment. The trial court instructed the jury that the defendant was not a purchaser in good faith, and was liable for the value of the property. Verdict for the plaintiff.

George W. Howe, for the plaintiff.

Vose and McLellan, for the defendant.

HASKELL, J. Trover for a horse and sleigh. One Gross procured them from the plaintiff by means of fraud, being a debtor of the defendant; afterwards Gross paid his debt with his own promissory note on time. Before the note became due he sold the horse to the defendant, who was ignorant of the fraud, in payment of the note. No defense is shown as to the sleigh, but exception is taken to the instruction that if the purchase by Gross was fraudulent the defendant would not be an innocent purchaser of the horse, and could not hold title to it, although he was ignorant of the fraudulent title of Gross, his vendor.

The horse was used to pay a pre-existing debt of Gross. The payment of that debt by his own note after he purchased the horse did not change the relation of the defendant to him from prior to subsequent creditor. The same debt existed all the time. The note was but a new evidence of it. The time of payment may have been extended, but no new debt was created, no new credit given, simply further credit for the payment of an old debt.

The doctrine in favor of innocent purchasers is that they have a right to rely upon the apparent title of their debtors to chattels in their possession, and deal with them as if the property were really their own. So it was held in *Gilbert v. Hudson*, 4 Me. 345, that chattels fraudulently purchased by a debtor might be held on attachment by his creditor to the extent of an indebtedness contracted between them subsequent to the fraudulent purchase, but not for a debt contracted prior to that time: *Gilbert v. Hudson*, 4 Me. 345; *Buffington v. Gerrish*, 15 Mass. 156; 8 Am. Dec. 97. This distinction between the rights of prior and subsequent creditors does not seem to have been always recognized: *Jordan v. Parker*, 56 Me. 557; *Wiggin v. Day*, 9 Gray, 97; *Atwood v. Dearborn*, 1 Allen, 483; 79 Am. Dec. 755; *Thaxter v. Foster*, 153 Mass. 151; *Donaldson v. Farwell*, 93 U. S. 631. But property so purchased and sold for a valuable consideration to a *bona fide* purchaser not conusant of the fraud cannot be reclaimed: *Trott v. Warren*, 11 Me. 227; *Neal v. Williams*, 18 Me. 391; *Sparrow v. Chesley*, 19 Me. 79; *Tourtellott v. Pollard*, 74 Me. 418.

The discharge of an antecedent debt has always been held in our state a valuable consideration for the transfer of negotiable paper not due, so as to shut out equitable defenses: *Homes v. Smyth*, 16 Me. 177; 33 Am. Dec. 650; *Norton v.*

Waite, 20 Me. 175; *Railroad Co. v. National Bank*, 102 U. S. 14. In many jurisdictions such transfer in good faith, as security merely, has also been held to so operate: *Goodwin v. Massachusetts Loan etc. Co.*, 152 Mass. 199; *Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. National Bank*, 102 U. S. 14. Our decisions are to the contrary: *Smith v. Bibber*, 82 Me. 84; 17 Am. St. Rep. 464. Does the same rule apply to the sale or pledge of chattels? In *Titcomb v. Wood*, 38 Me. 561, the court declares that it does not; but suggests a *quære*, whether it should not, and decides the case upon a doctrine quite as questionable, viz., that the discharge of a thief from liability for things stolen is a present consideration, and not equivalent to the payment of an antecedent debt.

The case of *Lee v. Kimball*, 45 Me. 172, cited by the defendant, upon casual reading might seem an authority in the defendant's favor, and it has been sometimes cited as such; but on examination it will be found not to be. A cargo of coal, purchased to arrive, was sold by indorsement of the bill of lading in payment of the consignee's debt. The consignor attempted to exercise his right of stoppage *in transitu*, and the court held he could not, remarking that, as a pre-existing debt is held a valuable consideration in the transfer of negotiable paper, on principle, it would so operate in the sale of the cargo. That may be so; but the consignor did not hold the same relation to the cargo that a vendor does to merchandise sold by reason of frauds practised upon him by the vendee. In such case the title passes subject to the vendor's right of rescission that, once exercised, revests the title in him. Such sale is not void, but only voidable. The consignor sold his cargo, without fraud practised upon him. His sale, once made, irrevocably passed the title to the consignee. The sale was neither void nor voidable, and therefore he could transfer the cargo to a *bona fide* purchaser by indorsement and delivery of the bill of lading as effectually as by an actual delivery of the cargo. The delivery of the muniment of title was a delivery of the property, and worked an executed sale, whereby the right of stoppage became barred: *Leask v. Scott*, L. R. 2 Q. B. Div. 376; *Clementson v. G. T. Railway*, 42 U. C. Q. B. 273.

It should be noticed that a merchant, by the exercise of stoppage *in transitu*, never regains title to the property sold, but only the possession, that he may enforce a lien for the unpaid purchase money. The title all the while remains in

the vendee. If the vendor converts the property, the vendee can maintain trover for it; and the value in excess of the price agreed to be paid will be the measure of damages. It is a proper subject of equity jurisdiction, where the vendor's lien can best be enforced: *Phelps v. Comber*, L. R. 29 Ch. Div. 821; *Wentworth v. Outhwaite*, 10 Mees. & W. 436; *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 El. & E. 680; *Schotsmans v. Lancashire etc. Ry. Co.*, 2 L. R. Ch. 332; *Ludlow v. Bowne*, 1 Johns. 15; 3 Am. Dec. 277; *Babcock v. Bonnell*, 80 N. Y. 244; *Stanton v. Eager*, 16 Pick. 467; *Mohr v. Boston etc. R. R. Co.*, 106 Mass. 67; *Newhall v. Vargas*, 15 Me. 314; 38 Am. Dec. 617.

The right of a vendee depends upon whether the resale was made to a purchaser ignorant of the fraud, and for a valuable consideration: *Tourtellott v. Pollard*, 74 Me. 418. And a valuable consideration in such cases means something more than the discharge of a debt that revives, when the consideration for its discharge fails. It means the parting with some value that cannot be actually restored by operation of law, leaving the purchaser in a changed condition, so that he may lose something beside his bargain: *Barnard v. Campbell*, 58 N. Y. 73; 17 Am. Rep. 208; *Stevens v. Brennan*, 79 N. Y. 258; *Hyde v. Ellery*, 18 Md. 496, 501; *McGraw v. Solomon*, 83 Mich. 442; *George v. Kimball*, 24 Pick. 234-240. The same rule applies to chattels pledged: *Goodwin v. Massachusetts Loan etc. Co.*, 152 Mass. 199.

True, the discharge of an antecedent debt, in one sense, is a valuable consideration; but if the title of the vendee fails, the discharge of his debt fails also, and he has lost nothing by the transaction. It is said that the vendor might pay his debt, and the vendee purchase the property with the proceeds. That is true, if the vendor have the means to do so, but all vendors are not solvent; if they were, there would be no occasion of reclaiming property fraudulently purchased by them, no occasion to rescind the sale. Other remedies would afford adequate redress. Or if the property be reclaimed after they had sold it in payment of their existing debts, those debts could be easily collected, and no one would suffer from the transaction; whereas, if, perchance, they are insolvent, and can by fraud purchase property, and apply it to their old debts, so as to leave their vendors without the power of reclaiming it, they, by defrauding one man, can therefore pay the debts of another, manifestly to the shame

of honest dealing and even and exact justice among men. The authorities sustain the ruling at *nisi prius*.

Exceptions overruled.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER, and WHITEHOUSE, JJ., concurred.

SALES—BONA FIDE PURCHASER FROM FRAUDULENT PURCHASER.—This question is thoroughly discussed in the extended notes to *Velstan v. Lewis*, 3 Am. St. Rep. 202 and *Williams v. Merle*, 25 Am. Dec. 613, in which the rule is stated to be that a *bona fide* purchaser without any notice of the fraud in the alleged sale and delivery to his vendor gets title to the article purchased. This rule is sustained by the following authorities: *Le Grand v. Bufaula Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140; *Stadtfield v. Hartsman*, 92 Pa. St. 53; 37 Am. Rep. 661, and note; *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278, and note; *Sinclair v. Healy*, 40 Pa. St. 417; 80 Am. Dec. 589, and note. See the following cases which depart from the rule stated above, and hold that the real owner of such chattels could maintain replevin for them from a purchaser in good faith from his fraudulent vendee: *Hamet v. Letcher*, 37 Ohio St. 356; 41 Am. Rep. 519; *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394; *Farley v. Lincoln*, 51 N. H. 577; 12 Am. Rep. 182.

CONSIDERATION—ANTECEDENT DEBT: See note to *Lockwood v. Bates*, 12 Am. Dec. 136, in which it is held that a pre-existing debt is a good consideration for a contract of sale. One who acquires a negotiable promissory note in payment of an existing debt is a purchaser for value and in the usual course of trade: *Herman v. Gunter*, 83 Tex. 66; 29 Am. St. Rep. 632, and note; *Hanold v. Kays*, 64 Mich. 439; 8 Am. St. Rep. 835, and note: See also the notes to *Bank v. Gilliland*, 35 Am. Dec. 568; *Earnest v. Parke*, 27 Am. Dec. 286, and extended note to *Bay v. Ooddington*, 9 Am. Dec. 272.

GOULDING v. HORBURY.

[25 MAINE, 227.]

GIFTS, CAUSA MORTIS.—If, while awaiting and expecting death, the owner of stocks, bonds, and bank books at that time in a cupboard in the room takes two wallets out of his pockets and also the key of the cupboard, and giving the key and wallets to his illegitimate daughter says to her, "Jane, take these and take the key of this cupboard; it is thine, and all that is in the cupboard is thine," and she thereupon takes them and takes all the bonds and bank books and looks them over and puts them back again and locks the cupboard and puts the key and the wallets in her pocket and retains both until after her father's death, this is a good gift *causa mortis*, especially if it appears certain from the whole evidence that he intended to bestow his estate on his daughter and died in the belief that he had done so.

ADMINISTRATORS, SUITS AGAINST, WHEN NEED NOT BE IN THEIR REPRESENTATIVE CAPACITY.—If an administrator takes possession of property as that of his intestate which another person claims has been given to him by the decedent, such donee may sustain an action against the administrator personally, because if the property did not belong to the

decedent at the time of his death it cannot be held by any one as his administrator.

WITNESSES.—ONE WHO CLAIMS PROPERTY UNDER AN ALLEGED GIFT FROM A DECEDENT is competent to testify as a witness in an action to recover it, from one who is administrator of the decedent but is not sued in his representative capacity.

TROVER for certain bonds and bank books of the value of four thousand eight hundred dollars. Verdict for the plaintiff.

McGillicuddy and Morey, for the plaintiff.

Newell and Judkins, for the defendant.

PETERS, C. J. Some of the facts of this case should be stated in order to appreciate the pending questions. Thomas Pemberton, over whose property controversy has arisen, died at Sabattus, in this state, in May, 1891, then seventy-two years old. He never was married, and he left no will. Jane Pemberton Goulding, his illegitimate daughter, born in England and living there until she became thirty-four years old, in April, 1890, came to this country to live with him. At the time of his death he owned a small house in Sabattus, all of which he rented excepting the basement, which was his kitchen, and the attic room in which he and his daughter slept in separate beds. He was for a lifetime industrious and saving, being evidently a man of miserly habits, and up to the time of his death had amassed an estate amounting to fifteen thousand dollars or more, consisting mostly of stocks, bonds, and savings bank books. In a corner of this attic room was a small portable cupboard, so called by the witnesses, brought by him from England when he first came to this country thirty to forty years ago, in which he kept his valuables of a moneyed kind, and any other papers he had. His habit was to keep the cupboard locked, with the key in his pocket.

He was taken sick on a certain Saturday, and died on the Wednesday following, occupying his bed from the first to the last of his sickness. The plaintiff claims that on Sunday during his last sickness, while expecting and awaiting death, he gave her about fourteen thousand dollars' worth of stocks, bonds, and bank books which were at that time in this cupboard. The present action is one of trover brought by her for a portion of such property against the defendant, who is the administrator of her father's estate. Upon her story as a witness her right of recovery mostly depends.

Her testimony is lengthy, but the most material portion of it is presented here, as follows: "I was just giving him [her father] a cup of tea, and he got hold of his pants that were on his bed, and he felt in his pockets and took his two old wallets out, and the key of the corner cupboard. He said, 'here Jane, take these,' he says, 'and take this key of the corner cupboard. It is thine, and all that is in the corner cupboard is thine, and don't let any one take it from thee, for thou art mine and I am thy father.' . . . He said, 'Now, Jane, don't let no one take them off thee, they are thine, and put thy foot down and say that everything of thy father's is thine, and don't let any one take them of thee.' . . . I just went to the cupboard and looked in, and took them in my arms and looked them over, and all the bonds were lying on the bottom of the cupboard, and I looked at them and put them back again. Then I got the bank books and looked at them and put them back again. There was a bundle of papers all strung up with strings, and I did not unfold them and did not examine them, but I put them back again; and I never troubled them afterwards until Mr. Levi Wooley came."

She further testified that after locking the cupboard she placed the wallets, containing about one hundred dollars in money, and the key in her own pocket, where they remained until her father died; that she had never had the key before this in her possession, but had been sent with it by her father to get papers from the cupboard for him; and that she placed some valuables of her own in the cupboard the same Sunday after the donation was made. Of this latter matter she said: "In the afternoon I went to my trunk and I put my two bank books in the cupboard. I thought I would lock them all up together; my father was so sick; there wasn't any safe place only this in the bedroom in that corner cupboard." On cross-examination she said her father was not too feeble to have got up and gone to the cupboard himself and that he had a full view of it and was within a few feet of it as he was situated in his bed.

It cannot be pretended that there was any unnaturalness in his giving her the bulk of his estate. She had for many years been acknowledged by him as his daughter. He visited England several times to see her and her mother, tarrying with them there for months at a time. His letters express great sympathy and affection for his child. And they contain

many intimations, if not avowals, that she might expect to receive his property at some time. He imparts to her confidential information, in his indirect way of saying and doing things, as to the amount of his property, an admission which he says he never made to any one else. The free interchanges in their correspondence resulted in her hastening to join her father in this country as soon as she got released from obligation to remain with her mother in England. Before she came here he had placed fifteen hundred dollars at interest in the other country, the income of which she received for the benefit of herself and her mother. And on leaving this country in 1888, for a visit across the water, he left a written order to a savings bank where he had four thousand dollars on deposit, besides accumulated interest due thereon, directing how the funds should be appropriated in case of disaster to him before his return, which paper may as well be incorporated herewith as reference will be made to it again; the paper running thus:

“dec. 27, 1888.

to Androscoggin
County Savings Bank
Lewiston Maine
to the President and Trustees
and treasurer Mr. frank w. Parker

i Thomas. Pemberton of Sabattus maine i am seting sail for England on the 27 of december, 1888, and if i do Not Land Safe Back to Sabattus Please Pay the whole amount of my deposits and interest due me in this County Saving Bank to my order in Both Books No. 558, and No. 1487 for it All Belong to Thomas Pemberton Not to Annie Wooley. Please to Pay it to my daughter, Jane Pemberton Goulding at No-12 wilson Brook kingston Hyde, Cheshire near manchester England By order of Thomas Pemberton Sabattus me”

In sustaining gifts *causa mortis* where the question of delivery is depending, it is a relief to feel that the donor had, for some time before the act was done, intended to make the gift; and it adds very much to the judicial confidence when that intention is manifested by some writing signed by the donor. Where the intent of the donor is proved under his own hand, the danger or likelihood of perjury is very far less than when the gift is claimed upon parol evidence unsustained by any writing. A court would be disposed to examine the one case less critically than the other: See *Brinckerhoff v. Lawrence*, 2 Sand. Ch. 400, 406.

It cannot be denied that Thomas Pemberton not only intended to bestow the most of his estate upon his daughter, but that he died with the belief that he had done so; unless we accept the theory of the defense, ably presented at the argument, that all his declarations apparently to that effect, made after that Sunday, referred to the paper lodged with the Androscoggin County Bank, with his supposed meaning of that paper, and not to the transaction testified to by the plaintiff. Her conduct after her father's death gives a good deal of plausibility at least to the defendant's position in that respect. Still, the testimony of the two neighbors of the deceased who were called in by him on the day before he died, and that of the attending physician, as to his declarations on this matter, corroborated as such testimony is by the same conception expressed in his letters, furnishes evidence of a contrary character not to be easily overcome. At all events, the letters present impregnable proof that the donor during a long period in his lifetime contemplated making the daughter the principal, if not the sole, recipient of his estate.

The defense contends that, whether there was any intention to give or not, there was no perfected gift, even if the plaintiff's testimony be fully believed; that any such intention was not followed by a sufficient actual delivery. On this point the presiding judge gave the jury the following ruling: "If, in contemplation of death at that time as the result of that sickness, Thomas Pemberton decided to make a gift of his property to his daughter, this plaintiff, and for that purpose delivered to her the key to the little cupboard, the cabinet, or closet in the corner of the room where they then were, for the purpose, I say, of enabling her to take possession of the property as her own, and with the intention on his part then and there to part with all dominion and control over the property, to release all right and claim ever after to resume possession of it again unless he recovered, and she used the key for that purpose and then and there accepted the property as her own and took it into her own custody and control, retaining the custody of the key ever after, and placing in the cupboard with this property, property which she had previously held in another place as her own, in her own custody; and if you find that in thus delivering the key to her, he placed it beyond his power to resume possession of this property otherwise than by the extraordinary means of breaking open the lock, and that he then intended it as an actual transfer

of possession of all the property in the cupboard, subject **only** to the condition of his recovery from that sickness, you **would** be authorized, if you believe all the testimony tending to support these propositions, to find it a sufficient delivery and transfer of possession to constitute a valid gift in contemplation of death.

“You must determine precisely what significance shall be attached to that act of delivering to her the key, with the remarks made in connection with it. The mere delivery of the key as a symbol of the property would not be a sufficient delivery, but only as a means of transferring the possession; when it is actually used for that purpose and the possession is actually transferred, that would constitute a valid and sufficient delivery.”

The defense relies on a series of decisions in our own State, the last of which is the case of *Drew v. Hagerty*, 81 Me. 231, 10 Am. St. Rep. 255, where all the preceding authorities are cited, as establishing the general doctrine that to constitute a valid gift *causa mortis* there must be clear and unmistakable proof, not only of an intention to give, but of an actual gift consummated by as perfect a delivery as the nature of the property given will admit of. And particular reliance is placed by the defense upon the practical application made by the court of such doctrine in *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464, where it was held that the delivery of a key of a small trunk containing money and government bonds would not be regarded as a delivery of such money and bonds, although such was the purpose and design of the donor. We are aware that the case of *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464, goes further than some of the decided cases in strictly applying the principle, as may be seen in a note to the case of *Thomas v. Lewis*, decided by the supreme court of Virginia (June 16, 1892), and reported in 31 Am. Law Reg. 662; but we can see no reason for dissatisfaction with the rule which was deliberately applied by this court to the facts of that case, a rule which has been followed in many reported and unreported cases since. The delivery of a key to a trunk is by no means so expressive and significant an act as a delivery of the articles contained in the trunk. One kind of delivery is more in the words spoken and the other more in the act done. It is easier to falsify as to words than as to an act, and the temptation to do so is greater and the chance of exposure less. Keys are things too easily to be obtained from

a dying man to allow the slightest importance to be attached to a mere possession of them as evidence of property. A claim to a trunk is more general, and a claim to the contents usually more particular. Strict rules in this branch of the law are absolutely indispensable. There is not a court in the civilized world that does not look with disfavor and suspicion on death-bed gifts established on parol evidence. The public should be educated as far as may be to the habit of making testamentary dispositions.

By these practical standards, therefore, must the plaintiff's very important claim stand or fall. If we give full faith and credit to that portion of her testimony which has been already herein quoted, the court is of opinion that her claim may be sustained. The facts of this case are more favorable for establishing a delivery than were those exhibited by the testimony in the case of *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464. In that case the testimony was more or less contradictory and suspicious. The claimant was presumably not a relative of the donor. Had the claim succeeded it would have resulted in a complete family despoliation. And the manual delivery was of the trunk and key and not of any articles in the trunk.

Here the gift was a natural one, and had been evidently contemplated for many years before the donor's final sickness. His letters repeatedly intimated if they did not promise some considerable gift. And during his last sickness he declared and emphasized his intention in the presence of some of his neighbors. The only real question must be whether there were acts enough done to constitute actual manual delivery within the letter and spirit of the rule hercinbefore enunciated. The donee received the wallets, a portion of the property given, from her father's hand and transferred them to her pocket. She took from him the key with which she unlocked and afterwards locked the little private cupboard. The donor had strength enough to have done those acts himself. But they were done before his eyes and by his direction. The articles within the cupboard were taken up and handled by the donee. And she knew at least in a general way what the articles were. She placed within the same receptacle on the same day certain savings bank books of her own, which before that time she had kept in a small tin trunk owned by her. She kept the key ever afterwards until the donor died, exercising the same care and dominion over

the cupboard and contents as any owner would. To be sure, there might have been a little more formality observed by his taking the papers in his own hands first and then passing them to her. The distinction is, however, a delicate one, and under all the circumstances may be regarded as unessential. Any lacking of the strictest formality is made up by the corroboration before mentioned.

We think the instruction, in the light of the facts we have reviewed, was correct. The judge stated what would be the consequence of such a delivery of the articles, "if accepted by the donee," meaning, no doubt, by the term acceptance the receiving and keeping the articles in the manner and under the circumstances testified to by the donee.

Any formality omitted in the delivery by him was made up in the acceptance by her in his presence. The substance of the rule, if not its strictest letter, was respected in the transaction.

But it is strongly contended by the defendant's counsel that the plaintiff's testimony is not trustworthy, and that her conduct and conversations subsequently to the death of her father were so inconsistent and conflicting with her present story that the alleged gift cannot be considered, as it must be to be valid, as established by clear, convincing and conclusive evidence. There is no doubt that a serious question of fact is involved in a determination of the case, but space cannot be spared in a judicial opinion to present the evidence or argument on that issue. It is sufficient here to say that the court, with some hesitancy on the part of some of its members, is of the belief that the necessary facts are proved to entitle the plaintiff to retain the verdict which the jury accorded her.

Another question arose at the trial, the defendant contending that the action should, even if the gift is to be regarded as proved, be brought against him in his representative capacity as administrator of the donor instead of against him personally. That position cannot be safely admitted. The consequences would in many cases be very harsh and unjust were that principle to prevail. The defendant must administer upon the donor's property and not upon the donee's. Your executor or administrator is entitled to the possession of your and not my property.

Another question was an incident of the trial, the counsel for the defendant insisting that, as the question of title is one

between the donee and the heirs of the donor, both parties claiming under the same person, the donee was not a competent witness in her own behalf to testify to any facts occurring before the death of the donor, and that the litigation is the same in effect as if it were between the plaintiff and the administrator. There is confessedly a good deal of force in this position. But it is now a settled question, and will probably remain so unless legislative interference changes it, that where neither party is an executor or administrator in the record, nor is made (by the act of court) a party as heir of a deceased party, either party may testify: *Gunnison v. Lane*, 45 Me. 165; *Nash v. Reed*, 46 Me. 168; *Wentworth v. Wentworth*, 71 Me. 72. What the right of the parties might be as witnesses were the action against or in favor of Horbury (present defendant) as an administrator would be another question.

Motion and exceptions overruled.

WALTON, VIRGIN, LIBBET, FOSTER, and HASKELL, JJ., concurred.

GIFTS CAUSA MORTIS.—WHAT VALID AS: See *Ridden v. Thrall*, 125 N. Y. 572; 21 Am. St. Rep. 758, and note; *Dress v. Hagerty*, 81 Me. 231; 10 Am. St. Rep. 255, and note; note to *Appeal of Walsh*, 9 Am. St. Rep. 87; extended notes to *Appeal of Waynesburg College*, 56 Am. Rep. 253; *Sheedy v. Roach*, 26 Am. Rep. 684; *Stephenson v. King*, 50 Am. Rep. 178; *Pope v. Burlington Sav. Bank*, 48 Am. Rep. 787; *Brum v. Schuett*, 48 Am. Rep. 506. A gift causa mortis must be a completed and executed gift, the same as in the case of a gift inter vivos: *Barnum v. Reed*, 136 Ill. 388. See *Devol v. Dye*, 123 Ind. 321, and *Trenholm v. Morgan*, 28 S. C. 268.

WITNESSES.—COMPETENCY OF PARTIES TO SUIT: See note to *Percey v. Powers*, 14 Am. St. Rep. 697, where the cases are collected. On a bill by the purchaser of land from the heirs of a deceased person to assert title in his own right, the defendants are competent witnesses: *Robbins v. Moore*, 129 Ill. 30. The exception in Revised Statutes of Texas, article 2248, naming "all actions by or against the heirs or legal representatives of a decedent, arising out of any transaction with such decedent," does not include "legatees or devisees." In a suit by an heir or devisee the parties may testify without restriction: *Newton v. Newton*, 77 Tex. 508; Howard's Statutes, sec. 7545, as amended by the laws of 1885, prohibiting the opposite party from testifying in a suit brought by heirs, to matters equally within the knowledge of the deceased, does not apply in a suit brought by the heirs of a lessor to recover rent: *Pendill v. Neuberger*, 64 Mich. 220. In a suit by the widow to recover damages for the killing of her husband, the defendants are competent witnesses: *Wallace v. Stevens*, 74 Tex. 559.

EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST PERSONALLY.—If the representative of a deceased lessee enters into possession of the leased premises, and receives the profits, he becomes personally liable to the lessor for rents to the extent of such profits during his occupancy: *Becker v. Wal-*

worth, 45 Ohio St. 169. Where money is paid to an administrator by mistake, for which he receipted as administrator, the action to recover it must be brought against him personally: *Grier v. Huston*, 8 Serg. & R. 402; 11 Am. Dec. 627. An executor or administrator cannot be sued as such for money borrowed, for goods furnished, or services rendered to the estate after the decedent's death, but for such contracts the remedy is against him personally: *Fitzhugh v. Fitzhugh*, 11 Gratt. 300; 62 Am. Dec. 653, and note; *Merchants' Nat. Bank v. Weeks*, 53 Vt. 115; 38 Am. Rep. 661, and note.

PREBLE v. MAINE CENTRAL RAILROAD CO.

[85 MAINE, 280.]

ADVERSE POSSESSION BY MISTAKE.—One who by mistake occupies for twenty years or more land not covered by his deed, with no intention to claim title beyond his actual boundary, wherever that may be, does not thereby acquire title by adverse possession to the land beyond the true line.

ADVERSE POSSESSION.—There is every presumption that occupancy is in subordination to the true title, and if a possession is claimed to be adverse, the act of the wrongdoer must be strictly construed, and the character of his possession clearly shown. His intention to claim adversely is an essential ingredient of the disseisin.

REAL ACTION. The plaintiff had occupied the premises in controversy up to the line of a certain fence. This fence was erected upon what was supposed at the time to be the true property boundary line. The plaintiff always believed it to be on such line, and supposed he was occupying his own land, and testified that he occupied up to such fence because he thought by so doing he was occupying his own land.

Spaulding and Buker, for the plaintiffs.

Baker, Baker, and Cornish, for the defendant.

WHITEHOUSE, J. In this writ of entry the plaintiffs seek to recover a small piece of land, triangular in shape, now covered by a portion of the defendant's freight platform at the Richmond station. The case is presented on report and discloses no material controversy respecting the facts. The rights of the parties must, therefore, be determined by applying the established principles of law to the fair and reasonable inferences drawn from the facts proved or admitted.

The original location of the defendant's railroad in 1848 was made four rods in width at the point in question, its westerly boundary being the easterly line of the premises then owned by the plaintiff's father. But in 1852 the company

purchased of the plaintiffs, who had in the mean time acquired title to the property, an additional strip two rods in width, extending across their lot, and adjoining the original location on the westerly side. At the same time the fence which had been erected on the supposed boundary line in 1848 was moved westerly by the defendant's servants for the purpose of inclosing the two rods then purchased; but the plaintiff, Israel Preble, testifies that in rebuilding the fence in "1864 or 1866" he moved it two feet further on to his own land. Prior to 1889 the defendants had used only a part of this additional strip, and hence there had been no occasion for an accurate survey of the land. But when, at the last-named date, it became necessary to enlarge the freight platform, measures were taken to have the boundary line between the parties definitely ascertained and fixed. It was then discovered from the record of the original location that the "central or directing line" of the railroad was not in the center of the four rods of land taken for the construction of the road, but was twenty-eight feet from the easterly line and thirty-eight feet from the westerly line of the location. It accordingly appeared that the true boundary of the defendant's land on the west was thirty-eight feet and two rods or seventy-one feet from the center of the main track of the railroad. By this measurement the boundary line was found to be west of the existing fence a distance of two feet and eight-tenths at the southerly end and eight feet and ten inches at the northerly end. Whether the mistake made by the defendant's servants respecting the distance the fence should have been moved in 1848 arose in part from an erroneous assumption that the central line of the track was the center of the location, or otherwise, does not appear, and it is not material to inquire. There is not only no evidence that the main track has been moved at this point since the original location, but it is satisfactorily shown that it has not been moved; and the simple process of drawing a line seventy-one feet westerly from the center of the main track and parallel with it now establishes beyond a doubt the location of the westerly line of the two-rod strip. The triangular piece in controversy is thus conclusively shown to be wholly on the east side of the true line, and hence a part of the land purchased of the plaintiffs in 1852.

But Israel Preble, the surviving plaintiff, claims that he cannot at this date satisfactorily locate his easterly line by

measurement; and says that he has continually occupied the land to the fence as it existed in 1889 upon the understanding and belief that it marked the true line, and he now claims title to the disputed piece by adverse possession. And the question is, can this claim on the part of the plaintiff be sustained on the facts here presented? Clearly not, unless the rule established by an unbroken line of the decisions of this court covering a period of nearly seventy years is now to be overturned. That rule is that one who by mistake occupies for twenty years, or more, land not covered by his deed, with no intention to claim title beyond his actual boundary wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line: *Brown v. Gay*, 8 Me. 126; *Ross v. Gould*, 5 Me. 204; *Lincoln v. Edgcomb*, 81 Me. 845; *Worcester v. Lord*, 56 Me. 266; 96 Am. Dec. 456; *Dow v. McKenney*, 64 Me. 138.

We are aware that the soundness of this doctrine has been questioned in other jurisdictions. It has been said that the possession is not the less adverse because the person possessed intentionally though innocently; and the further objection has been made that it introduces a new principle by means of which the stable evidence of visible possession under a claim of right is complicated with an inquiry into the invisible motives and intentions of the occupant: *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680; *Wood on Limitations*, sec. 263, and authorities cited. It is manifest, however, that those holding these views have not critically distinguished the decisions of our court upon the subject, and hence have failed to apprehend their true import and exact limitations.

A frequent recurrence to elementary truths in any science is the greatest safeguard against error, and in the ultimate analysis of the doctrine of adverse possession the distinctive element which supports the rule above stated at once becomes apparent. Indeed it is aptly suggested in the familiar test imposed by Bracton: "*Querendum est a iudice quo animo hoc fecerit*": *Coke on Littleton*, 158 b; 8 Mod. Rep. 55. The inquiry must be *quo animo* is the possession taken and held.

There is every presumption that the occupancy is in subordination to the true title, and if the possession is claimed to be adverse, the act of the wrongdoer must be strictly construed, and the character of the possession clearly shown: *Roberts v. Richards*, 84 Me. 1, and authorities cited. "The intention of the possessor to claim adversely," says Mellen,

C. J., in *Ross v. Gould*, 5 Me. 204, "is an essential ingredient in disseisin." And in *Worcester v. Lord*, 56 Me. 266, 96 Am. Dec. 456, the court says: "To make a disseisin in fact there must be an intention on the part of the party assuming possession to assert title in himself." Indeed, the authorities all agree that this intention of the occupant to claim the ownership of land not embraced in his title is a necessary element of adverse possession. And in case of occupancy by mistake beyond a line capable of being ascertained, this intention to claim title to the extent of the occupancy must appear to be absolute, and not conditional; otherwise the possession will not be deemed adverse to the true owner. It must be an intention to claim title to all land within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not. If, for instance, one in ignorance of his actual boundaries takes and holds possession by mistake up to a certain fence beyond his limits, upon the claim and in the belief that it is the true line, with the intention to claim title, and thus, if necessary, to acquire "title by possession" up to that fence, such possession, having the requisite duration and continuity, will ripen into title: *Hitchings v. Morrison*, 72 Me. 331, is a pertinent illustration of this principle. See also *Abbott v. Abbott*, 51 Me. 575; *Ricker v. Hibbard*, 73 Me. 105.

If, on the other hand, a party, through ignorance, inadvertence, or mistake, occupies up to a given fence beyond his actual boundary, because he believes it to be the true line, but has no intention to claim title to that extent if it should be ascertained that the fence was on his neighbor's land, an indispensable element of adverse possession is wanting. In such a case the intent to claim title exists only upon the condition that the fence is on the true line. The intention is not absolute, but provisional, and the possession is not adverse: *Dow v. McKenney*, 64 Me. 138, is an excellent illustration of this rule. In that case a fence had been maintained on a wrong divisional line by mistake, and it was found by the court as a matter of fact that "none of the parties had any idea of maintaining any line but the true divisional line, and that they occupied according to the fence only because they supposed it was on the true divisional line between them." Upon this finding it was held, as a matter of law, that such possession was not adverse to the right of the true owner. The unconditional intent to claim title to the extent of the occupancy

was wanting. See also *Worcester v. Lord*, 56 Me. 266; 96 Am. Dec. 456.

Thus it is perceived that possession by mistake as above described may or may not work a disseisin. It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseisin. The two rules are expressly recognized and carefully distinguished in our recent decisions. The distinction between them is neither subtle, recondite, or refined, but simple, practical, and substantial. It involves sources of evidence and means of proof no more difficult or complex than many other inquiries of a similar character constantly arising in our courts.

The conclusions of fact which are fairly warranted by the evidence leave no room for doubt that the case at bar falls within the principle last stated. It has already been seen that, prior to 1889, both parties were ignorant of the fact that the fence erected by the plaintiff in "1864 or 1866" was not on the true line. The plaintiff, Israel Preble, himself testifies that after he moved the fence he had always regarded it as the true line; that he had occupied the land up to the fence upon the supposition and belief that it was the true line, and that he had so occupied it because he thought it was his own land. This testimony, viewed in the light of the circumstances and situation of the parties, emphatically negatives the idea that during this time the plaintiff had any intention to claim title to land which did not belong to him. We are warranted in believing that it would do injustice to the plaintiff himself, as well as violence to all the probabilities in the case, to assume that immediately after the plaintiff had conveyed the land to the defendant for a satisfactory consideration he formed the intention of depriving the company of a portion of the same land by disseisin in case the fence should not prove to be on the true line.

The conclusion is irresistible that the plaintiff held possession of the locus by mistake, in ignorance of the true line, with an intention to claim title only on condition that the fence was on the true line. His possession was, therefore, not adverse to the true owner, and cannot prevail against the valid record title of the defendant.

Judgment for the defendant.

PETERS, C. J., WALTON, VIRGIN, and HASKELL, JJ., concurred. EMERY, J., did not concur.

ADVERSE POSSESSION BY MISTAKE.—That possession is not adverse when adjoining owners claim only to the true line between them, see cases cited in note to *Sartain v. Hamilton*, 62 Am. Dec. 527; *Brewer v. Boston etc. R. R. Co.*, 5 Met. 478; 39 Am. Dec. 694; *Crowell v. Beebe*, 10 Vt. 33; 33 Am. Dec. 172; *Knowlton v. Smith*, 36 Mo. 507; 88 Am. Dec. 152; *Hass v. Plautz*, 56 Wis. 105; 43 Am. Rep. 699; *Finch v. Ullman*, 105 Mo. 255; 24 Am. St. Rep. 383, and extended note; *Kunze v. Evans*, 107 Mo. 487; 28 Am. St. Rep. 435; *Battner v. Baker*, 108 Mo. 311; 32 Am. St. Rep. 606; *Wacha v. Brown*, 78 Iowa, 432. On the other hand, it was held in *Obernally v. Edgar*, 28 Neb. 70, that if one by mistake inclose the land of another, and claim it as his own to certain fixed monuments or boundaries, there will be an adverse possession.

PARIS v. NORWAY WATER CO.

[85 MAINE, 330.]

TAXATION, REAL ESTATE, WHAT TAXABLE AS.—Under a statute providing that real estate shall be assessed in the town where it lies, and defining real estate as including all lands and all buildings erected or affixed to the same, and lands as including all tenements and hereditaments connected therewith, and all rights thereto, and all interests therein, aqueducts, conduits, pipes, and hydrants used to distribute water among the citizens of a town, though supplied by a pumping station and reservoir in another town, are assessable and taxable as real estate in the town in which they are situate.

ACTION to recover taxes on the property of the defendant, the town of Paris, consisting of aqueducts, pipes, conduits, hydrants, and franchises within that town.

J. S. Wright, for the plaintiffs.

Bearce and Stearns, for the defendant.

HASKELL, J. Debt for a tax laid upon defendant's aqueducts, conduits, pipes and hydrants, as real estate, within the town of Paris. These appliances are used to distribute water among the citizens of Paris, supplied by a pumping station and reservoir in Norway, where the defendant corporation has its place of business. By charter (Acts of 1885, c. 369; 1887, c. 46), defendant is authorized to supply the inhabitants of Paris and Norway with water, and to lay pipes necessary for the purpose through the streets of both towns. The charter does not locate the corporation in either town.

Taxes on real estate are to be assessed "in the town where the estate lies, to the owner or person in possession thereof": Rev. Stats., c. 6, sec. 9. And real estate for the purposes of taxation includes "all lands, . . . and all buildings erected

on or affixed to the same": Rev. Stats., c. 6, sec. 3. And the word "lands" includes "all tenements and hereditaments connected therewith, and all rights thereto, and interests therein": Rev. Stats., c. 1, sec. 4, rule 10.

Under these provisions, a boom across the Kennebec river, fastened to permanent piers in the river, and to the shores by chains, was held to be real estate for the purposes of taxation: *Hall v. Benton*, 69 Me. 346. So was that part within the state of a toll-bridge across a river that marks the boundary line: *Kittery v. Portsmouth Bridge*, 78 Me. 93. Water-pipes were assessed *in solido* with personal property in *Rockland v. Rockland Water Co.*, 82 Me. 188, and in a suit for the tax it was contended that they were real estate, and improperly included in an assessment with chattels; but the court, without deciding the question, held it immaterial, as the controversy was one of overvaluation merely.

It will be seen from these authorities that the court gives very wide scope to the definition of real estate, for the purposes of taxation; and it is best that it should be so. Subjects of public revenue should contribute to the public burdens so that they may lie as equally as possible among all the people. And in these days, when capital accumulates in commercial centers, many times representing contrivances, local and permanent in character, that contribute an income, it is just that such source of profit pay its tax where its location may be.

Aqueducts above or under ground are but conditions suited for carrying water, undefiled, through or over the soil. They are fixtures, permanent in character, and part of the land that sustains them. Size, capacity, and the material used in their construction, do not change their nature. They are a constituent part of the freehold, and so long as they remain the property of the owner of the fee their character as real estate will not be questioned. It is only when they are constructed and occupied by persons or companies having no title in the soil that their classification as property becomes doubtful, that is, the interest of such persons or companies in them becomes of doubtful classification, rather than their generic character, regardless of ownership. The owner of a fee may, by sale of some structure upon it, and by granting license for it to remain, as between himself and the vendee, make it a chattel, while as a whole, in a generic sense, it would be classified as real estate.

The proper classification, under the rules of the common law, of this species of property, is not a new question. It has been many times considered in England during the last century. And water-mains and underground conduits have there been considered as fixed to, included in, and a part of the soil. They have been considered real estate, and have uniformly been held locally taxable as such to the "occupiers of lands" under the statute of 43 Eliz., or, as our statute puts it, to the person in possession thereof": *King v. Bath*, 14 East, 610; *King v. Rochdale Water Works*, 1 Maule & S. 634; *King v. Brighton Gas Light and Coke Co.*, 5 Barn. & Cr. 466.

Under the statute of 38 Geo. III, laying taxes upon the owners of "lands and hereditaments," the pipes of a water company in a street were held to be not taxable as land to the owners of them. Lord Campbell says: "The right in question, where exercised, appears to us to be in the nature of an easement, and neither land nor hereditament. The right is to convey water through the land of another; and whether the water is to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appears to us for this purpose to be immaterial. The mere power to lay the pipes in land cannot be considered land or hereditaments; nor do we think that the pipes, when laid, can be so considered within the meaning of the land tax acts. . . . The company are not the owners of the land where the pipes lie; nor are they the tenants of the land. . . . The moment the company take up their pipes which had been laid under the streets of any particular parish all pretense for saying that they have or held land in the parish would be gone, but, after the pipes are removed, all the land in the parish would remain, and it would be had and be held as before. . . . But 'land,' like the word 'inhabitant,' which likewise occurs in the 43 Eliz. c. 2, has various meanings; and it may, in that statute, passed to throw a charge upon the occupier, mean the ground on which a chattel is deposited in the exercise of an easement, although, in other acts of parliament, it means a legal interest in the soil. This is the meaning which we think it bears in the land tax acts": *Chelsea Water Works v. Bowley*, 17 Q. B. 358.

The city of Providence laid a tax on the pipes of the gas company in the streets, as real estate, under a statute authorizing such a tax against those "who hold or occupy the same," and it was held a valid tax like those laid under the statute

of Elizabeth: *Providence Gas Co. v. Thurber*, 2 R. L. 15; 55 Am. Dec. 621.

So a pipe line, laid through the soil of New Jersey, under grants from the owners of the fee, is not only real estate when considered as a part of the fee, but is held, for the purposes of taxation, to be real estate of the company owning it, under a statute defining real estate as including all lands and all buildings or erections thereon or affixed thereto: *Tide-Water Pipe Line Co. v. Berry*, 52 N. J. L. 308.

Gas mains and pipes are sometimes distinguished from the class of property now under consideration, as apparatus for the delivery of the manufactured article, and are considered machines or chattels: *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Memphis Gas Light Co. v. State*, 6 Cold. 310; 98 Am. Dec. 452. Water-pipes, etc., are not machinery: *Dudley v. Jamaica Pond Aqueduct Corp.*, 100 Mass. 183.

The public has an easement in land, over which streets and roads are laid, coextensive with the necessities of public use. No title in the soil is acquired thereby, and when the ways are discontinued the easement is extinguished. Private corporations, like gas companies, water companies and street railway companies, by legislative authority, are sometimes allowed the use of the public easement to serve the necessary demands of society, and without any additional compensation to the owner of the soil. Such companies, therefore, by the public license accorded them, take no title in the land. They are simply allowed to use it for the public convenience as a counterbalancing consideration for their expenditures, giving opportunities to gather tolls from its use. In using the street or road they place their pipes or rails in or upon the ground there permanently to remain. They occupy land with appliances that become valuable for the revenue they yield. These appliances are fixed, permanent, used in connection with the soil that supports and sustains them. When considered as the property of their respective companies they are not land within the common law rule. But when considered as if owned by the same person who has title to the soil they may properly enough be so considered. Suppose the street with these appliances in it be discontinued, and they be abandoned without removal, and pass to the owner of the soil, who should then lease them in gross or singly to tenants or persons desiring to operate them, Would they not be real estate when considered with the property as a whole? Would

they not pass by a deed of the land? Why then may they not properly enough be assessed as real estate, and to the person in possession of them? Their value as chattels would be nominal. Water-pipes buried in the ground as chattels would be of little or no value. It is the use that gives them value, and that use is strictly of a fixture, a permanent appliance. As bearing upon this view, see *Flax Pond Water Co. v. Lynn*, 147 Mass. 31; *City of Fall River v. County Commrs.*, 125 Mass. 567; *People v. Cassidy*, 46 N. Y. 46.

In the last case cited, in considering the validity of a tax upon a street railway as land under a statute very similar to ours, Folger, J., said: "The statute means, for its purpose, to make two general divisions of property: one, all lands, another, all personal estates; and then, to be more definite, it declares, that by land is meant the earth itself, and also all buildings and all other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not in the view of the statute land unless held and owned in connection with the ownership of a fee in the soil. We are of the opinion that the statute means that such an interest in real estate as will protect the erection, or affixing thereon, and the possession of, buildings and fixtures, which will bring those buildings and fixtures within the term "land," and hold them to assessment as the lands of whomsoever has that interest in the real estate and owns and possesses the buildings and fixtures. The defendants are right, then, in considering the track of the relators as land, and liable to assessment as such."

In our opinion water mains, pipes, etc., may be considered real estate and taxable where they are located to the person or company owning them. The idea that they may be considered appurtenances to the place of supply and taxable there is untenable. There is no principle upon which it can rest: *King v. Bath*, 14 East, 610, and *King v. Brighton Gas Light and Coke Co.*, 5 Barn. & C. 466. See *Boston Mfg. Co. v. Newton*, 22 Pick. 22. The Iowa doctrine that water-works are real estate and taxable as an entirety at the place of supply is not supported by authority: *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa, 407.

Defendant defaulted.

PETERS, C. J., WALTON, LIBBEY, and FOSTER, JJ., concurred.

TAXES.—WHAT TAXABLE AS REAL ESTATE: Telegraph line: *Western Union Tel. Co. v. State*, 9 Baxt. 509; 40 Am. Rep. 99; rolling stock of railroad company: *Louisville etc. R. R. Co. v. State*, 25 Ind. 177; 87 Am. Dec. 358; foundations, columns, and superstructure of an elevated railroad: *People v. Connera*, 82 N. Y. 459 (citing several analogous cases); ownership of standing, growing timber: *Fletcher v. Township of Alcona*, 72 Mich. 18; title of water company to a permanent dam and sluiceway connected with a pond, even though the title is to an easement only: *Flax Pond Water Co. v. City of Lynn*, 147 Mass. 31. Rights in a reservoir of water are real estate, and taxable where the land by which the reservoir is created is situated, and not where the rights are utilized for producing a water-power: *Winnipegosis etc. Mfg. Co. v. Gilford*, 64 N. H. 337.

MARKET AND FULTON NATIONAL BANK v. SARGENT.

[85 MAINE, 349.]

NEGOTIABLE INSTRUMENTS—EXECUTION OF, IN BLANK.—If one affixes his signature to a printed blank for a promissory note, and intrusts it to the custody of another for the purpose of having the blanks filled up, he thereby confers the right, and such instrument carries on its face the implied authority to fill up the blanks and complete the contract at pleasure as to names, terms, and amounts so far as consistent with the printed words, and an oral agreement between the maker and his agent limiting the amount for which the note shall be perfected cannot affect the rights of an indorsee who takes the note before maturity for value, in ignorance of the agreement that a different amount should be written in it.

NEGOTIABLE INSTRUMENTS.—THE PRESUMPTION THAT THE HOLDER ACQUIRED A NEGOTIABLE INSTRUMENT IN GOOD FAITH without notice of fraud arises upon proof that he paid full value for it before maturity.

R. F. Dunton, for the plaintiff.

W. H. Fogler, for the defendant.

WHITEHOUSE, J. This was an action on a promissory note for seven hundred and eighty-five dollars, brought by the plaintiff bank as indorsee of Earl B. Chace and Company against the defendant as maker of the note.

The defendant seasonably filed his affidavit that the paper declared on had been materially altered since it was executed.

The facts were not controverted. The defendant had signed a prior note for the accommodation of Chace and Company which was outstanding and overdue at the time of the signing of the note in question. At Chace's request he agreed to sign three other accommodation notes to take up the overdue note, each to be for one-third of the amount. But when the parties met for the purpose of executing this agreement the amount

of the overdue note was not definitely known to either of them, but was understood to be between six hundred dollars and six hundred and fifty dollars. Thereupon, at Chace's suggestion, the defendant signed three printed blank notes and delivered them to Chace, who agreed to fill them out with the requisite amount specified in each, when ascertained, and use them for the purpose of taking up the overdue note. The note in suit is one of the three notes thus signed. But instead of making it for one-third of the overdue note, according to his agreement, Chace fraudulently wrote in, "seven hundred and eighty-five dollars," and indorsed the note to the plaintiff bank before maturity in the ordinary course of business, receiving therefor the full amount of the note less fifteen dollars and ninety-six cents discount thereon. It is not claimed, however, that Chace made any alteration in the printed terms of the blank thus delivered to him. He simply inserted in the blank spaces such words and figures as were necessary to constitute the instrument a complete promissory note. There is also positive testimony from the plaintiff's discount clerk that at the time the note was discounted the bank had no knowledge of any equities existing between the defendant and Chace, but took the note in the usual course of business. Upon this evidence the presiding justice directed the jury to return a verdict for the plaintiff for the amount of the note in suit.

This instruction was correct. The court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict could not be sustained: *Heath v. Jaquith*, 68 Me. 433; *Jewell v. Gagne*, 82 Me. 431; *Moore v. McKenney*, 83 Me. 80; 23 Am. St. Rep. 753.

It is well settled and familiar law that, if one affixes his signature to a printed blank for a promissory note and intrusts it to the custody of another for the purpose of having the blanks filled up and thus becoming a party to a negotiable instrument, he thereby confers the right, and such instrument carries on its face an implied authority, to fill up the blanks and complete the contract at pleasure, as to names, terms and amount, so far as consistent with its printed words. As to all purchasers for value without notice, the person to whom a blank note is thus intrusted must be deemed the agent of the signer, and the act of perfecting the instrument is deemed the act of the principal. An oral agreement between such principal and agent limiting the amount for which the note

shall be perfected cannot affect the rights of an indorsee who takes the note before maturity for value, in ignorance of such agreement, with a different amount written in it: *Bank of Pittsburgh v. Neal*, 22 How. 97; *Angle v. Northwestern etc. Ins. Co.*, 92 U. S. 330; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196; 25 Am. Rep. 67; *Kellogg v. Curtis*, 65 Me. 59; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Breckenridge v. Lewis*, 84 Me. 349; 30 Am. St. Rep. 853; Bigelow's Bills and Notes, 571.

But the defendant contends that it is not satisfactorily shown by affirmative evidence that the bank was an innocent purchaser.

Proof of fraud in the inception of the note undoubtedly casts upon the indorsee the burden of showing that he took the note for value, before maturity, without notice of the fraud: *Farrell v. Lovett*, 68 Me. 326; 28 Am. Rep. 59; *Kellogg v. Curtis*, 69 Me. 213; 31 Am. Rep. 273. But proof that he paid full value for the note before maturity raises a presumption that he purchased it in good faith without notice of the fraud; and until overcome by rebutting evidence this presumption stands in lieu of direct proof: *Kellogg v. Curtis*, 69 Me. 213, 31 Am. Rep. 273.

The plaintiff's testimony that the note was discounted in the usual course of business before maturity, for its face value less the discount stated, is not controverted. A *prima facie* case is thus made out for the plaintiff, without the aid of the affirmative statement of the discount clerk that the bank did not know of any equities between the defendant and Chace. There is no opposing evidence to overcome the presumption arising from the purchase of the note before maturity for full value, and no evidence in the case upon which a verdict for the defendant could be allowed to stand.

Exceptions overruled.

PETERS, C. J., LIBBEY, FOSTER, and HASKELL, JJ., concurred.

NEGOTIABLE INSTRUMENTS.—NOTE EXECUTED IN BLANK, LIABILITY OF MAKER OF: See note to *Spitler v. James*, 2 Am. Rep. 340, 341. To the point that one who signs a blank bill or note and delivers it to another makes that person his agent, to fill the blanks, so far as *bona fide* purchasers are concerned: See *Davis v. Lee*, 26 Miss. 505; 59 Am. Dec. 267; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Roberts v. Adams*, 8 Port. 297; 33 Am. Dec. 291; *Holland v. Hatch*, 11 Ind. 497; 71 Am. Dec. 363; *Hall v. Bank of Commonwealth*, 5 Dana, 258; 30 Am. Dec. 685; *Johnson Harvester Co. v. McLean*, 57 Wis. 258; 46 Am. Rep. 39; *Breckenridge v. Lewis*, 84 Me.

249; 30 Am. St. Rep. 353; *Geddes v. Blackmore*, 132 Ind. 551; *Coors v. German Nat. Bank*, 14 Col. 202; *Frank v. Hollands*, 81 Iowa, 164, and cases cited in the notes to *Fordyce v. Kosminski*, 4 Am. St. Rep. 26, and *Bedell v. Herring*, 11 Am. St. Rep. 316, 317.

FRAUD IN THE INCEPTION OF NEGOTIABLE INSTRUMENT throws upon the holder the burden of proving that he acquired the paper *bona fide*, for value, before maturity, in the usual course of business, and without notice of the fraud: See cases cited in note to *Bedell v. Herring*, 11 Am. St. Rep. 325, and *Vosburgh v. Diefendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836; *Commercial Bank v. Burgwyn*, 108 N. C. 62; 23 Am. St. Rep. 49; *Henry v. Sneed*, 99 Mo. 407; 17 Am. St. Rep. 580; *Joy v. Diefendorf*, 130 N. Y. 6; 27 Am. St. Rep. 484. The presumption in favor of the holder is stronger than that stated by the court. Mere possession by the indorsee, or by the transferee, where no indorsement is necessary, imports *prima facie* that the instrument has been acquired under the several conditions which create a perfect right of recovery, viz., that the holder is the lawful owner, and that he acquired the instrument before maturity, *bona fide*, for value, in the usual course of business, and without notice of any circumstance impeaching its validity: See cases cited in note to *Bedell v. Herring*, 11 Am. St. Rep. 323. Proof of payment of full value merely strengthens the presumption that the holder's right of recovery is perfect, and is not necessary to raise it.

BOSTON AND MAINE RAILROAD v. SMALL.

[85 MAINE, 462.]

PROCESS, OFFICER, WHEN MAY JUSTIFY UNDER.—One who seizes the property or arrests the person of another by legal process or other equivalent authority conferred by law can only justify himself by a strict compliance with such process or authority. If he fails to execute or return the process as thereby required, he stands as if he never had any authority to take the property, and therefore appears to have been a trespasser from the beginning. In this respect there is no difference between civil and criminal process.

PROCESS—OFFICER BECOMING TRESPASSER AB INITIO.—Acts of omission may expose an officer to liability as a trespasser *ab initio*. The *dictum* of the Six Carpenters' case that "Not doing cannot make a party who has authority or license by law a trespasser *ab initio*, because not doing is no trespass" disapproved.

PROCESS, FORFEITING PROTECTION OF BY MAKING A FALSE RETURN.—If an officer acting under a warrant commanding him to search in a freight car for intoxicating liquors, and, if found, to safely keep the same with the vessels in which they are contained until final action and decision be had thereon, finds such liquor and, believing it not to be intended for unlawful sale, falsely returns that he made the search and found no liquor he thereby forfeits the protection of his process and becomes answerable in an action of trespass for breaking into the car while executing his warrant.

George C. Yeaton, for the plaintiff.

James O. Bradbury and Samuel W. Luques, for the defendant.

EMERY, J. The plaintiff corporation as a common carrier had in its possession on one of its sidetracks, in Biddeford, a box freight car laden with merchandise for various parties, and locked and sealed. While the car was in this situation and condition the defendant, a deputy sheriff for York county, armed with a search warrant from the Biddeford municipal court under Rev. Stats., c. 27, sec. 40, broke the lock and door, and entered the car in the night-time, soon after midnight. His warrant commanded him to "therein search for intoxicating liquors, and, if there found, to seize and safely keep the same with the vessels in which they are contained, until final action and decision be had thereon." He did find in the car one barrel of intoxicating liquor, viz: a barrel of alcohol, but did not seize it, being of the opinion that it was not intended for unlawful sale. He, however, made upon the warrant the erroneous return that he searched the car and found no intoxicating liquor. The plaintiff thereupon brought this action of trespass for the breaking into its car through the lock and door. The defendant has pleaded a justification under the warrant above described.

Assuming the complaint and warrant and the search under them to have been in other respects legal and regular, the question arises whether the intentional omission "to seize and safely keep," etc., the intoxicating liquors found in the car by the officer invalidates his authority under the warrant and leaves him a trespasser.

Though often obscured in earlier and ruder times, it is a distinctive feature of our common law system of jurisprudence that it so jealously guards the liberty and property of the citizen against the capricious, arbitrary or extra-legal acts of government officers, and at the same time insists upon the full performance of their legal duty. English history abounds with instances of the assertion of this principle. Two conspicuous instances are the beheading of one king for overstepping the law, and the expulsion, some fifty years later, of another king partly for refusing to execute certain laws. The principle is now imbedded in the fundamental law of our republics.

Imbued with this spirit, our law requires of every ministerial officer assuming to execute a statute or legal process against the person or property of the citizen a strict observance of every provision of the statute and of every lawful command in the process. The law permits to such an officer

no discretion in this respect. If he once begin, he must execute the process, the whole process, and nothing but the process. Many extracts from judicial opinions could be quoted stating this rule as strongly and comprehensively. One distinguished jurist has used judicially the following language: "A man who seizes the property or arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, he may not perhaps in the strictest sense be said to become a trespasser *ab initio*; but he is often called such, for his whole justification fails, and he stands as if he never had any authority to take the property, and therefore appears to have been a trespasser from the beginning." Gray, J., in *Brock v. Stimson*, 108 Mass. 521; 11 Am. Rep. 390. By substituting the word "injure" for the word "seize" in the above quotation the language of Justice Gray would be literally applicable to this case.

There would seem to be no difference in principle between civil and criminal processes in this respect, and hence illustrations may properly be taken from either class of cases. In *Blanchard v. Dow*, 32 Me. 557, a tax collector regularly sold cattle of the plaintiff upon a tax warrant. He omitted afterward to render "an account in writing of the sale and charges" as required by the statute and his warrant. It was held that this omission deprived him of the protection of his warrant. In *Carter v. Allen*, 59 Me. 296; 8 Am. Rep. 420, a tax collector under the same circumstances did render the account in writing and tender the surplus; but the statement of account proved to be incorrect. It was held that this error vitiated the officer's immunity. In *Ross v. Philbrick*, 39 Me. 29; *Brackett v. Vining*, 49 Me. 356; and *Smith v. Gates*, 21 Pick. 55, it was held that an omission by an officer to execute a command in the precept at the precise time named therein invalidated his authority and made him liable as a trespasser to those with whose property he had interfered under his precept. In the last-named case, *Smith v. Gates*, 21 Pick. 55 there was a variation of only twenty minutes. In *Tubbs v. Tukey*, 3 Cush. 438, 50 Am. Dec. 744, an officer arrested the plaintiff on a criminal process on Sunday, and committed him to jail. On the following Monday morning instead of taking the plaintiff before the police court, as required by law

to do, the officer assumed to discharge the plaintiff from arrest. It was held that the omission to take the plaintiff before the court took away from the officer all justification for the arrest. In *Russell v. Hanscomb*, 15 Gray, 166, a fish-warden, as authorized by statute, took a seine which was illegally set. He did not, however, as required by statute, begin a legal proceeding for the forfeiture. In the words of Shaw, C. J., the court held that the warden's "failure to prosecute was a departure from his authority, and in legal effect deprived him of his justification." In *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390, a police officer by authority of a statute arrested the plaintiff for being drunk and disorderly in a public place; but instead of taking him before the court for trial, as further required by statute, he released the plaintiff from arrest as soon as he recovered from his intoxication. It was held that this disobedience of the statute took away all protection under the statute. In *Phillips v. Fadden*, 125 Mass. 198, upon a similar state of facts the proposition was again asserted that, if an officer fails to do all that the law requires him to do, his whole justification fails. It has also been held, and is a familiar principle, that the omission by the officer to obey the final and formal command to make return of the precept, under which he assumes to act invalidates his authority under the precept, and renders him liable to an action for anything done under it: *Williams v. Babbitt*, 14 Gray, 141; 74 Am. Dec. 670; *Williams v. Ives*, 25 Conn. 568; *Dehm v. Hinman*, 56 Conn. 320.

In the *Six Carpenters' Case*, 8 Coke, 146a, in which the doctrine of trespass *ab initio* seems to have been first formally expounded, it was said that the reason for holding a person acting under authority of law to be a trespasser *ab initio* by any subsequent abuse of such authority, was that his subsequent illegality showed that he began with an unlawful intent. This *dictum* has been often repeated in various forms. It seems, however, to be artificial and even fictitious. An officer may often, in fact, begin with the best and most lawful intent and yet forfeit his protection by subsequent misconduct. The more solid and sure foundation for such a rule would seem to be public policy. It is inconsistent with both private security and public order, that ministerial officers should assume to determine for themselves how far and in what manner they will enforce a statute or execute a process. If the safety of the citizen requires that such officers shall do no act not

authorized, the safety of the people equally requires that such officers shall omit no act that is commanded.

It was further resolved in the *Six Carpenters' Case*, 8 Coke, 146a, that "not doing cannot make the party who has authority or license by law, a trespasser *ab initio*, because not doing is no trespass." This *dictum* also has been often repeated, and has at times influenced judicial decisions. The reasoning may seem plausible, but in reality it is a bit of sterile, verbal syllogization. It has borne no good fruit.

It is difficult to see any difference in principle between misfeasance and nonfeasance in a ministerial officer. In either case he is foresworn—has disobeyed the statute or process he has sworn to execute faithfully. It is the disobedience, not the act, that deprives him of his authority. The disobedience is the fatal poison which paralyzes the protecting arm of the law; and this disobedience can come as well from acts of omission as commission.

The learned editor of the American Decisions in the notes to *Barrett v. White*, 8 N. H. 210, 14 Am. Dec. 365, criticises this *dictum* of the *Six Carpenters' Case*, 8 Coke, 146a. He says the distinction seems to be merely artificial, and should not be allowed to protect a disobedient officer. He cites many cases in which (he says) the distinction has been practically disregarded. Reference is made to those notes and citations without further quotations from them here.

The courts of Maine and Massachusetts, while sometimes alluding to or quoting this *dictum*, have practically ignored it when dealing with cases like this one before us. Every case above cited from the decisions of those courts were cases of nonfeasance or omission. The tax collector simply omitted to do some particular thing, either entirely or at the specified time. The police officers simply omitted to do some act required. The failure to make return of the process is a simple omission. The New Hampshire court seems to uphold the distinction drawn in the *Six Carpenters' Case*, 8 Coke, 146a, for in *Ordway v. Ferrin*, 8 N. H. 69, it held precisely the contrary of our decision in *Brackett v. Vining*, 49 Me. 356. Our stricter rule is firmly established in our law, and we think upon grounds of public policy it is the better and more reasonable rule. While, of course, in a given case, an officer may have a sufficient, lawful excuse for his omission, the general, plain, reasonable, and necessary proposition is, that a ministerial officer must faithfully obey every lawful com-

mand in the statute or process, or he will be left without its protection in any suit against him for any acts done by him under color of such statute or process. The case of *Hinks v. Hinks*, 46 Me. 423, in no way conflicts with this proposition, for there the defendant was not an officer, and was only exercising a private right.

Recurring, now, to the case before us, it is evident that the principal purpose of the statute (Rev. Stats., c. 27, sec. 40), and of the process issued under it, was the seizure of whatever intoxicating liquors were found, and the bringing them before the court for determination whether they were intended for unlawful sale. The authority to enter the car and there search was given for that express purpose. The defendant officer exercised the authority to search, but he willfully and deliberately refused to seize the intoxicating liquors he found, and made a false return that he found none. He assumed to nullify the main command of the statute and of his process. He willfully defeated the very purpose of the search he assumed to make. Such a flagrant disobedience should, and we think does, destroy the protection he might otherwise have justly enjoyed.

The good faith of the defendant, his strong belief that the intoxicating liquor he found was not intended for unlawful sale is no excuse, and does not mitigate the penalty. As said in *Guptill v. Richardson*, 62 Me. 262, the fact "that it [the liquor] was not liable to forfeiture would not excuse the officer for disobedience to his precept." The command to seize the liquors was plain. His duty was plain. He was given no discretion—no power to determine what intoxicating liquors he would or would not seize. He should not have arrogated to himself any such power.

It is urged that it may at times work a great hardship upon an innocent owner if an officer must in every case seize whatever intoxicating liquors he finds under a search warrant, however evident it is they are not intended for unlawful sale. The policy of the law is that every owner or keeper of intoxicating liquor shall be prepared to defend them before the courts, and not before the officer, against the accusation that they are intended for unlawful sale. The convenience of such owner or keeper must give way to the good of the people, and to their undoubted right to protect themselves in this way against the consequences of the traffic in such articles. At any rate the officer must obey the law and his lawful process.

It is urged that the omission to seize the liquors in this case caused this plaintiff no special injury, however much the public may have been harmed. The search, however, did the plaintiff an injury. The lock and door of its car were broken by the defendant. He might have made that breaking official and lawful by doing his whole official duty. He saw fit, however, to disregard his precept and abandon his duty. This abandonment of duty was also an abandonment of his authority, and left him amenable for all the damage done by him to the plaintiff corporation.

Defendant defaulted. Damages assessed at ten dollars.

WALTON, LIBBEY, FOSTER, and WHITEHOUSE, JJ., concurred.

PETERS, C. J., did not sit. _____

OFFICER, WHEN DEEMED TRESPASSER AB INITIO: See note to *Barrett v. White*, 14 Am. Dec. 365-369. An officer having made a lawful levy can only be made a trespasser *ab initio* by a subsequent act of trespass, not by an omission or neglect of duty: *Waterbury v. Lockwood*, 4 Day, 257; 4 Am. Dec. 215. Abuse of legal authority or license by one who first acted with propriety under it makes him a trespasser *ab initio*: *Dickson v. Parker*, 3 How. (Mass.) 219; 34 Am. Dec. 78; *Contra: Wendell v. Johnson*, 8 N. H. 220; 29 Am. Dec. 648. No return, however, is required on a search warrant if the goods are not found: *Chipman v. Bates*, 15 Vt. 51; 40 Am. Dec. 663. As to the liability of a sheriff for failure to return an execution, see note to *Sloas v. Case*, 25 Am. Dec. 571.

BRUNSWICK GAS LIGHT CO. v. UNITED GAS, FUEL, AND LIGHT CO.

[85 MAINE, 582.]

FRANCHISE, ASSIGNABILITY OF.—A gas company possessing and exercising the right to lay its pipes in the public streets cannot sell, lease, nor assign its corporate rights and privileges to another gas company without the consent of the legislature.

CORPORATION—ULTRA VIRES.—A CONTRACT MADE BY A CORPORATION WHICH IS UNLAWFUL and void, because beyond its corporate powers, does not by being carried into execution become lawful and valid. The proper remedy of an aggrieved party is to disaffirm the contract and sue to recover as upon a *quantum meruit* the value of what the defendant has actually received the benefit of.

CORPORATION EXECUTING A LEASE OF ITS PROPERTY WHICH IS VOID, because it had no power to give such lease, cannot, though possession is taken and held under the lease, recover the rent stipulated therein. It may, however, recover a reasonable rent, and the lease may be offered in evidence as an admission of what rent is reasonable.

ACTION to recover damages for breach of the covenants of a lease. The defense was that the lease was of property held

by the lessor as a *quasi* public corporation and, not being authorized by the legislature, was void.

Barrett Potter, for the plaintiff.

G. W. Heselton, for the defendant.

WALTON, J. The question is whether a gas company, which possesses and exercises the right to lay its pipes in the public streets, can sell, lease, or assign its corporate rights and privileges to another gas company without the consent of the legislature.

We think the question must be answered in the negative. Corporations possessing and exercising the right of eminent domain owe duties to the public from the performance of which they are not allowed to escape by a sale or lease of their franchises, without first obtaining the consent of the legislature. The franchise of a corporation having the right to receive tolls may be levied on to satisfy an execution against the corporation, and in this way it may be deprived of its corporate powers and privileges. And they may be lost by the foreclosure of a legally executed mortgage. And they may also be lost by laches in reclaiming them when they have been illegally sold, leased, or assigned. But, subject to these well-defined exceptions, it is now settled by an overwhelming weight of authority that public or *quasi* public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public, as well as to their stockholders; and that they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. It is the duty of gas companies, water companies, electric light companies, telegraph and telephone companies, street railway companies, and all similar corporations, which have obtained the right to use the public streets for the erection or extension of their works, to serve the public faithfully and impartially, and at reasonable rates. And this is a duty the performance of which may be enforced by the courts. And one reason why these corporations are not allowed to sell or lease their corporate powers and franchises, without legislative authority, is that, if they were able to do so, they might thereby disable themselves from the performance of their public duties, and thus escape from the power of the courts and of the legislature to enforce their performance.

But a still more serious objection to the traffic in corporate

franchises is the ease with which such a power could be used to create monopolies. By its exercise, a single corporation could easily become possessed of the corporate powers and privileges of all its rivals, and thereby annihilate competition and obtain a complete control of the markets. Such combinations are usually hurtful, and sound public policy requires that they be kept under legislative supervision and restraint.

To the argument that similar combinations may be made by individuals, it has been aptly replied that men are mortal, and their combinations short-lived, but corporations are immortal, and their combinations and acquisitions may go on forever; that they may add field to field, wealth to wealth, and power to power, till they become too strong for the government itself; that all experience shows that such accumulations of wealth and power are dangerous to the public welfare; and that while society can endure the accumulations and combinations of mortals, which must end at the grave, it cannot endure similar accumulations and combinations of power by corporations, which may continue forever.

In a case in New Jersey, decided in August, 1892, it is said that corporations which engage in a *quasi* public occupation, such as railway, water, gas, telegraph, and similar corporations, are created upon the hypothesis that they will be a public benefit; that they usually possess the right of eminent domain, and not unfrequently the use of the public highways is accorded to them; and that while the state confers upon them these special and extraordinary privileges, it at the same time exacts from them the performance of public duties; that such corporations hold their franchises not merely in trust for the pecuniary profit of their stockholders, but also in trust for the public; and that such corporations cannot lease or otherwise dispose of their franchises needful in the performance of their public duties, without legislative consent: *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52.

In a case in Illinois, decided in 1887, the court held that reason and the weight of authority were in favor of the doctrine that a corporation has no right to sell or lease its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain, without legislative authority: *Fietsam v. Hay*, 122 Ill. 293; 8 Am. St. Rep. 492.

In another case, decided in 1889, a corporation for the manufacture and sale of gas, having a capital of twenty-five mil-

lion dollars, had obtained by purchase a controlling interest in four other gas companies, having an aggregate capital of nearly seventeen million dollars; and, in the vigorous language of the court, was thus able to destroy the energies of all other corporations of the same kind, and suck the life-blood out of them; and the court held that such a combination could not be tolerated; that the business of manufacturing and distributing illuminating gas by means of pipes laid in the public streets of a city is a business of a public character; that it is the exercise of a franchise belonging to the state; that the services to be rendered for such a grant are of a public nature; and that any unreasonable restraint upon the performance of such duties is prejudicial to the public interests, and in contravention of public policy, and could not be allowed: *People v. Chicago Gas Trust Co.*, 130 Ill. 286; 17 Am. St. Rep. 319.

Equally vigorous is the language of the New York court of appeals. In a case relating to the combination known as the Sugar Trust—a trust that included the Forest City Sugar Refining Company of this state, and so successfully sucked its life-blood out of it, that its machinery has since remained as silent as a city of the dead—the court said that corporate grants are always assumed to have been made for the public benefit, and that any conduct which destroys their normal functions, and maims and cripples their separate activity, must affect unfavorably the public interest; and that this is so to a much greater extent when a combination includes and dominates an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion; that it is not a sufficient answer to say that similar results may be lawfully accomplished by an individual having the necessary wealth, for it is one thing for the state to respect the freedom of the citizen, and quite another thing to create artificial persons to aid in promoting such aggregations; that the individuals are few who hold such enormous wealth; but if corporations can combine and mass their forces, a tempting and easy road is opened to enormous combinations, vastly exceeding in strength and in power over industry any possibilities of individual ownership: *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843.

The law does not assume that all combinations of corporate powers and franchises are necessarily hurtful. It recognizes

the fact that they are sometimes beneficial, and provides a way by which they may be lawfully made. But as such combinations are liable to be made for improper purposes, and with conditions annexed to them which are inadmissible, sound public policy requires that they be made under legislative supervision and restraint.

In the present case the Brunswick Gas Light Company undertook to lease all its property, and all its corporate rights and privileges, to the United Gas, Fuel, and Light Company, for twenty-five years. The latter company took possession of the works, and held them for seventeen and a half months, making improvements upon them, and paying a portion of the agreed rent. It then abandoned the works, and possession was resumed by the lessors.

This is a suit by the lessors against the lessees for a breach of the covenants contained in the lease. It was contended in defense that the lease was illegal and void, and that no recovery could be had upon it. The presiding justice ruled as a matter of law that the plaintiff company and the defendant company had power to execute the lease, and that a recovery could be had for a breach of the covenants contained in it. We think the ruling was erroneous. No legislative authority for making the lease was shown, and, without such authority, we think the lease must be regarded as *ultra vires* and void. The authorities bearing upon the question are not in entire harmony; but the weight of authority seems to us to be overwhelmingly in favor of this conclusion: See 2 Beach on Corporations, section 831 to 856, inclusive, and the six pages of authorities, *pro* and *con*, cited under the section last cited. The cases are too numerous for citation here, and the few cases to which we have referred will furnish a key to all of them.

But it is claimed that inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the *ultra vires* agreement may be used as evidence, in the nature of an admission of what is a reasonable

rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void, and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray, in a recent case in the United States supreme court. He said that a contract made by a corporation which is unlawful and void, because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid; and that the proper remedy of the aggrieved party is to disaffirm the contract, and sue to recover, as on a *quantum meruit* the value of what the defendant has actually received the benefit of: *Pittsburgh etc. Ry. Co. v. Keokuk etc. Bridge Co.*, 131 U. S. 371. We think this is the correct rule: 2 Beach on Corporations, sec. 423, and cases there cited.

Exceptions sustained.

PETERS, C. J., EMERY, FOSTER, and HASKELL, JJ., concurred.

Right to Transfer Public Franchises.*

General Rule as to the Nontransferability of Franchises.—The cases are virtually in unison as to the doctrine that a transfer of franchises cannot be effected without the authority of the sovereign grantor. The rule is the same whether the transfer is attempted to be made by a voluntary act, such as conveyance, mortgage, lease, consolidation, or by a forced sale at the instance of the creditors of the holder of the franchises. As to the former branch of the rule, see *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen, 65; 87 Am. Dec. 700; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290; *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42; 72 Am. Dec. 685; *Roper v. McWhorter*, 77 Va. 214; *Hall v. Sullivan R. R. Co.*, 2 Red. Am. Ry. Cas. 621; 1 Brunner Col. Cas. 613; *Goe v. Tide-Water Canal Co.*, 24 How. 257; *Morgan v. Louisiana*, 93 U. S. 217; *Coe v. Columbus etc. R. R. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518; *Clarke v. Omaha etc. R. R. Co.*, 4 Neb. 458; *Black v. Delaware etc. Canal Co.*, 24 N. J. Eq. 465; *Ammant v. New Alexandria Turnpike Co.*, 13 Serg. & R. 210; 15 Am. Dec. 593; *Gulf etc. Ry. Co. v. Morris*, 67 Tex. 692; *Bruffett v. Great W. R. R. Co.*, 25 Ill. 353; *Arthur v. Commercial Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; *Ragan v. Aiken*, 9 Lea (Tenn.), 609; 42 Am. Rep. 684; *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 581; *Troy and Boston R. R. Co. v. Boston, Hooeac Tunnel etc. R. R. Co.*, 86 N. Y. 107; *Abbott v. Johnstown etc. R. R. Co.*, 80 N. Y. 27; 36 Am. Dec. 572; *People v. Albany etc. R. R. Co.*, 77 N. Y. 232; *East Bos-*

* REFERENCE TO MONOGRAPHIC NOTES.

Franchises, whether subject to execution: 15 Am. Dec. 595.

Consolidation of corporations: 79 Am. Dec. 421.

Power of corporations to convey or otherwise dispose of property: 23 Am. Dec. 340.

Exemption of corporate property from mechanic's lien: 73 Am. Dec. 602.

Forfeiture of corporate franchises: 8 Am. St. Rep. 179.

ten Freight Co. v. Hubbard, 10 Allen, 459; *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52, and the principal case. The second branch of the rule is illustrated by the following cases: *Bayard's Appeal*, 72 Pa. St. 453; *James v. Pontiac Road Co.*, 8 Mich. 91; *Randolph v. Larned*, 27 N. J. Eq. 557; *Leedom v. Plymouth R. R. Co.*, 5 Watts & S. 265; *Wood v. Truckee Turnpike Co.*, 24 Cal. 474. See also Freeman on Executions, sec. 179; and note to *Amman v. Turnpike Road*, 15 Am. Dec. 595. So strictly is the principle that a franchise is not subject to execution upheld by the courts, that the franchises will not pass under an execution sale of a turnpike "road and appurtenances," even if such a sale may lawfully be made: *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; and if after an execution sale of a ferry license the licensors (in this case the supervisors of a county) refuse to renew the license of the former licensee, under the mistaken impression that his privileges have passed by the execution sale to the purchaser from the sheriff, they may be compelled by *mandamus* to issue a fresh license: *Thomas v. Armstrong*, 7 Cal. 286. *Trustees of Maysville v. Boon*, 2 J. J. Marsh. 225, is sometimes cited to the point that a ferry license is assignable at the will of the licensee. An examination of that case, however, shows that it was decided with a view to a local law, under which ferry franchises on the Ohio river were deemed to be the privileges of riparian proprietors, and therefore hereditaments appurtenant to the land, which belonged to the owner thereof, by virtue of his ownership, and without any special grant from the state. The larger question as to the possibility of assigning ferry franchises not regulated by this law was expressly waived by the court as being irrelevant.

The only courts which have declined to accept the above doctrine to the full extent are those of Maine, Kentucky, and Vermont: *Shepley v. Atlantic etc. R. R. Co.*, 55 Me. 395; *Kennebec etc. R. R. Co. v. Portland etc. R. R. Co.*, 59 Me. 9; *Bardstown etc. R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199; 81 Am. Dec. 541; *Bank of Middlebury v. Edgerton*, 30 Vt. 182; *Miller v. Rutland etc. R. R. Co.*, 36 Vt. 452. In the first case the court said that the doctrine that the franchises of a corporation could not be mortgaged seemed to it "little better than practical repudiation." This conclusion, however, seems to be deduced from a false hypothesis, viz., that the alienation of franchises, whether by mortgage or otherwise, is held to be illegal in the absence of a statute allowing it, solely because there is a particular confidence reposed by the legislature in the first grantees. If the doctrine generally adopted had no more rational foundation than this, few, we suppose, would hesitate to follow the authority of the above cases. That doctrine, however, is, as will be shown in the ensuing subdivisions, supported by very different and much weightier considerations than the one here suggested, and it is to be presumed that a dialectical victory gained by ignoring the strongest arguments of the advocates of the contrary view will not command much respect in other jurisdictions. In the cases of *Bank of Middlebury v. Edgerton*, 30 Vt. 182, and *Bardstown etc. R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199, 81 Am. Dec. 541, a distinction was drawn between prerogative and nonprerogative franchises, and it was said that the right to mortgage franchises, without express statutory permission, was only applicable to the latter class, to which the privilege of constructing and operating a railroad was deemed to belong. Plainly, however, this distinction is untenable on the principles of the very courts from which it emanates; for if a transfer of franchises is unlawful, as is said, for the sole reason that they are a personal trust vested in the corporators, and that reason is shown to be unsound, there can be no logical halting place between the two extremes of permitting none or per-

mitting all the franchises, whether prerogative or nonprerogative, to be alienated like the rest of the corporate property. If all the instrumentalities and privileges which the state has granted for the purpose of enabling the corporation to carry on the business for which it was organized are to be permitted to pass into other hands at the will of the corporators, there is surely something of an absurdity in denying the validity of a transfer of certain other franchises, on the ground that they are what is termed prerogative. This consideration is independent of the fatal objection that, if the view usually accepted is correct, the franchise of constructing and operating a railroad must be reckoned as a prerogative franchise: *Redfield on Railways*, 23. Certainly the argument of the court in *Bardotown etc. R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199, 81 Am. Dec. 541, that this franchise cannot be a prerogative franchise, because there is nothing to prevent an individual from building a railroad on his own land or on the land of others, with their consent, and charging tolls for the carriage of freight and passengers on such road, is not an adequate refutation of that view. Theoretically, this right may exist, but, as an actual fact, none of the railroads of the country have been constructed without the exercise of the sovereign powers of eminent domain or taxation, and it is difficult to see how a franchise which cannot be enjoyed without the previous exercise of prerogative franchises can be regarded as different in kind from the latter. Even if it be regarded as different, for the technical reason that it represents a privilege which any citizen may be supposed capable of enjoying under certain virtually impossible conditions, the fact that, under the only circumstances which the courts have to consider it, it is intimately connected with and dependent upon franchises which are undeniably of a prerogative character, leads irresistibly to the conclusion that its disposal should be subject to the same restrictions as those franchises to which it owes its very existence. This distinction between property acquired by the aid of the state and property acquired without such aid is the principle underlying the cases in which it has been held that the right of way and water rights of a ditch company or an irrigation company, when acquired merely by purchase in the open market or by gift from the original proprietors, may be alienated without legislative authority, because they are not franchises at all under such circumstances: *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300; *State v. Western Irrigating Canal Co.*, 40 Kan. 96; 10 Am. St. Rep. 167.

Foundation of the Rule as to the Nontransferability of Franchises.—We have seen that the weight of authority in favor of the doctrine that franchises are, without exception, incapable of transfer without the consent of the legislature is overwhelming. A perusal of the cases shows that there is by no means the same harmony of opinion as to the fundamental principles upon which the doctrine is based. The following reasons have been assigned by the courts for its existence: 1. A franchise is a personal trust, and the state has therefore a right to declare who shall be the transferee of such trust; 2. A corporation enjoying public franchises is an agent of the state, and on the ordinary principles of agency is incapable of delegating its powers without the permission of its principal; 3. A grant of a public franchise is a contract between the state and the grantee, by which the latter undertakes to perform certain public duties, from the performance of which he cannot release himself without the consent of the other contracting party; 4. The powers of the grantee of a public franchise, like other grantees of the sovereign, are strictly limited by the instrument of grant, and the existence of a power to alienate such a franchise cannot be inferred in the absence of ex-

press statutory provisions; 5. Transfer of franchises may sometimes be illegal, as tending to the establishment of monopolies. We shall now proceed to examine, briefly, these various theories.

A Franchise Deemed to be a Public Trust.—In a preceding subdivision of this note we commented on this view, and while expressing our agreement with the opinion of certain courts, that it furnishes a totally inadequate foundation for the general rule as to the nontransferability of franchises, we endeavored to show that to concede this did not by any means involve the consequence that the rule itself was unsound, even in the case of the so-called nonprerogative franchises. The theory of a personal confidence reposed in the original corporators rests on a purely arbitrary foundation, as is shown very conclusively by the arguments in the Maine and Vermont cases cited in the subdivision referred to, and the legislation which has in most, if not all, the states of the Union provided for a free transfer of franchises, as the result of the mortgage thereof, and even for the incorporation of the entirely uncertain body of persons who may purchase at the foreclosure sale, shows very conclusively that, in the opinion of the people of this country, the grounds of public policy upon which this restriction of the power of transfer is to be sustained must be sought in other directions.

Transfer of Franchises Illegal Because a Delegation of Powers.—Several courts of high authority have put the rule upon this ground where the validity of leases, or agreements held to be equivalent to leases, have been under consideration: *Beman v. Rufford*, 1 Sim., N. S., 569; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 9 Hare, 306; *Winch v. Birkenhead etc. Ry. Co.*, 5 De Gex & S. 562; 13 Eng. L. & Eq. 506; *Richmond Water Works Co. v. Richmond*, L. R. 3 Ch. Div. 82; *Troy and Rutland R. R. Co. v. Kerr*, 17 Barb. 581. In view of the ordinary statement of the reason why an agent cannot delegate his powers, viz., that an agency is a personal trust, the rulings in these cases would seem to lend some support to the theory discussed in the preceding subdivision. But a perusal of the decisions will, we think, show very clearly that the illegality of the delegation is not placed upon this ground, but partly upon the ground that the right to delegate powers had not been expressly granted, and hence could not be exercised, and partly upon the ground that such a delegation necessarily deprives the corporation of the capacity for performing the duties which it has undertaken by the act of accepting the privileges bestowed in its charter. Thus, in speaking of an agreement by which one railway company was to work the line of another, using the plant and property of the latter, Vice-Chancellor Parker remarked that "what was called 'working the line' was a duty imposed upon the company whose line was to be used," and that "the agreement, therefore, was that the company should part with certain statutory powers which they had no authority to part with, and moreover that they were to part with them to a body who, by their constitution, could not accept them": *Winch v. Birkenhead etc. Ry. Co.*, 5 De Gex & S. 562; 13 Eng. L. & Eq. 506. Similarly, in *Beman v. Rufford*, 1 Sim., N. S., 569, the court laid stress upon the fact that a delegation of the right to work a railway was an act necessarily incompatible with the discharge of the duties imposed on the delegating company. So also in *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 9 Hare, 306, Turner, L. J., said of an agreement which was declared to operate as a lease, that it was "framed in total disregard of the obligation and duties" of the contracting companies. It seems to be clear, therefore, that although the expression "delegation of powers" is used in these decisions, the principles underlying them are really the same as those discussed

in the two following subdivisions, and that the ideas of agency and personal confidence had little or no influence upon the minds of the judges who pronounced these decisions.

Grantee of Franchise is Bound to the Performance of Public Duties.—There seems to be no difference of opinion as to the doctrine that the grant of a franchise amounts to a contract between the sovereign and the grantee, the consideration on the part of the latter being the discharge of certain specified duties. The bearing of this doctrine upon the subject of the transfer of franchises cannot be better stated than in the following remarks of Justice Miller in *Thomas v. Railroad Co.*, 101 U. S. 83: "The principle is, that where a corporation like a railroad company has granted to it by charter a franchise in a large measure intended to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, or by which it undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy": *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672; *Roper v. McWhorter*, 77 Va. 214; *Munroe v. Thomas*, 5 Cal. 470; *Lauman v. Lebanon etc. Ry.*, 30 Pa. St. 42; 72 Am. Dec. 685; *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24; *Freeman v. Minneapolis etc. Ry. Co.*, 28 Minn. 443; *Kenton County Court v. Turnpike Co.*, 10 Bush, 529; *Lakin v. Railroad Co.*, 13 Or. 436; 57 Am. Rep. 25; *Pierce v. Emery*, 32 N. H. 484; *Railroad Co. v. Brown*, 17 Wall. 445; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 130; *New York etc. R. R. Co. v. Winans*, 17 How. 30. The last-named case affords a good illustration of the strictness with which the courts hold the grantees of public franchises to their obligations. The entire stock of a railroad corporation organized in Pennsylvania to construct and operate a road in that state was taken by a Maryland corporation, which thereupon undertook the entire management of the road and furnished the rolling stock. Under these circumstances it was held that the owner of a patent which had been infringed in the operation of the road could hold the Pennsylvania corporation responsible. Justice Campbell said, in regard to the contention of that corporation, that the cars upon which the device was used were not built by it, and did not belong to it: "This conclusion implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature."

Franchises Cannot be Transferred Without Legislative Authority, Because Grants From the Sovereign Are Strictly Construed.—"The powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumer-

ation of those powers implies the exclusion of all others": *Thomas v. Railroad Co.*, 101 U. S. 82, per Justice Miller, citing with approval *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775, and *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331; *Board of Commissioners of Tippecanoe County v. Lafayette etc. R. R. Co.*, 50 Ind. 85; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; *Lauman v. Lebanon etc. Ry.*, 30 Pa. St. 42; 72 Am. Dec. 685; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290; *Richardson v. Sibley*, 11 Allen, 65; 87 Am. Dec. 700; *Abbott v. Johnstown etc. R. R. Co.*, 80 N. Y. 27; 36 Am. Rep. 572; *Black v. Delaware etc. Canal Co.*, 24 N. J. Eq. 464.

That contracts involving the transfer of public franchises without legislative authority are not valid for any purpose is well established: See the elaborate opinion of Justice Gray in the recent case of *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, in which a full account of the earlier decisions in the supreme court of the United States is given. Equity will not enforce such contracts: *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; nor will the fact that a railroad company has undertaken to sell its franchises to another be a defense to an action by the former company to recover a subscription conditioned to be paid when the road should be completed between certain points: *Hays v. Ottawa etc. R. R. Co.* 61 Ill. 422. The true remedy of a party who has been prejudiced by such a contract is to disaffirm it and sue on a *quantum meruit*: *Pittsburgh etc. Ry. v. Keokuk and Hamilton Bridge*, 131 U. S. 371; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290. The principle upon which such relief is allowed is thus stated by Justice Gray in *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 60: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action on the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting money or property parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it."

Transfer of Franchises May Be Unlawful as Tending to Monopolies.—The consideration upon which the opinion of the court in the principal case lays the chief stress, viz., that the power of transferring franchises might be used to create monopolies, seems to have come into prominence only within recent years, and is doubtless an outgrowth of the economic developments which have exhibited their most characteristic fruit in the vast combinations usually known as trusts. As a reason against the acquisition by one corporation of the franchise of another it is, of course, as valid as any of the other grounds of public policy upon which it has been deemed proper to keep the transfer of franchises under legislative control. But its application is obviously limited to this one case, so far as judicial interference is concerned. No cognizance can be taken by the courts of those cases in which individuals who own the whole stock of one corporation acquire, as individuals, the stock of another corporation, unless, perhaps, under the very extreme circumstances upon which the supreme court of Ohio was recently invited to pass in *State v. Standard Oil Co.*, 49 Ohio St. 137; 34 Am. St. Rep. 541. Nor, it may be said, is it at all necessary to invoke this consideration for the purpose of bringing such transactions within the pale of illegality. The principle that the powers of corporations are to be strictly construed and the principle

that corporations owe certain duties to the public are amply sufficient to warrant judicial interference.

Sequestration of Profits of Franchises by Courts of Equity.—Before statutory provision was made for execution sales of franchises, there would seem to have been, in some jurisdictions at least, no way in which this part of the corporate property could be subjected to the claims of creditors. Thus in the early case of *Ammant v. Turnpike Co.*, 13 Serg. & R. 210, 15 Am. Dec. 593 (1825), the court, while holding that a levy could not be made on the franchises of a toll-road company, declared that this defective condition of affairs which permitted a corporation to contract debts, and gave their creditors no means of coercion, was to be remedied only by the legislative power. The proper method, it was thought, would be to provide some mode of sequestration, by which the profits arising from roads might be secured to the creditors of the companies—a suggestion adopted some years afterwards by the legislature: *Reed v. Penrose*, 36 Pa. St. 240. The inability of the courts of Pennsylvania to give relief in such cases was stated to be due to the fact that they possessed only limited equitable powers, and it may be presumed that the courts of some other states would have been equally embarrassed for the same reason. See the remarks of the court in *Richardson v. Sibley*, 11 Allen, 65; 87 Am. Dec. 700. Wherever the full powers of chancery existed there would obviously have been no difficulty in satisfying the claims of creditors by sequestration of profits: *Miers v. Z. & M. Turnpike Co.*, 11 Ohio, 273; *Covington Bridge Co. v. Shepherd*, 21 How. 112. The same exercise of equitable powers was extended in *McCauley v. Givens*, 1 Dana, 261, so far as to allow the leasing of a ferry under an order of court, it being held that this was merely a method of securing the profits for the benefit of creditors. On similar principles it was held in the recent case of *Louisville Water Co. v. Hamilton*, 81 Ky. 517, that the property of a corporation organized to supply a city with water could not be seized and sold for taxes, so as to deprive the public of the benefits to be derived from it unless authority for that purpose was given by the legislature, and that the proper remedy was to place the management of the corporation in the hands of a receiver until the burden was discharged. Such ample provision, however, has now been made by statute for reaching the effects of corporations, that there are very few jurisdictions in which the interference of a court of equity would be required or invoked for the purpose of compelling the payment of corporate debts, the appointment of a receiver being now regarded as essentially a temporary expedient to secure the claims of creditors until the law has taken its course.

Transfer of Franchises Under Legislative Authority.—The principle which underlies all the cases involving the validity of transfers of franchises made under legislative authority is, that the powers granted for this purpose are strictly construed. It will be found that the courts have steadfastly refused to sanction any mode of alienation which is not permitted expressly or by reasonable implication in the statute upon which the right of alienation depends. Numerous cases illustrating this principle will be found cited in the following subdivisions. Sometimes, however, subsequent ratification by the legislature may serve to validate a transfer otherwise void: *Kennebec etc. R. R. Co. v. Portland etc. R. R. Co.*, 59 Me. 9; *Shaw v. Norfolk etc. R. R. Co.*, 5 Gray, 162; *Hatcher v. Toledo etc. R. R. Co.*, 62 Ill. 477; *People v. Duncan*, 41 Cal. 507. But the intention to ratify must be clearly expressed. Hence it was held in *Thomas v. Railroad Co.*, 101 U. S. 71, that a lease otherwise invalid, as being *ultra vires*, could not be deemed to have received

the ratification of the legislature, because, while the lessees were operating the road, an act was passed limiting the rates which the "directors, lessees, or agents of the railroad" were to charge for the carriage of freight and passengers. "It is not," observed Mr. Justice Miller, "by such an incidental use of the word 'lessees,' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter and forbidden by public policy is to be made valid and ratified by the state." Compare *Oregon Ry. etc. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.

Transfer of Franchises, What It Signifies.—Some discussion as to the real meaning and effect of a transfer of franchises has arisen. After mature consideration it was held in *State v. Sherman*, 22 Ohio St. 411, that what is shortly termed a transfer of franchises must, for the purpose of determining the rights of the transferees in their relation to the state, be regarded as a surrender of the franchises by the original holders, and a re-grant thereof to the transferees. The doctrine of this case has been so universally approved that we shall cite the portion of the opinion which deals with this point: "That a corporation can, when authorized by law so to do, transfer, sell, or convey its charter or franchise to be a corporation, and thus vest it in others, seems to be quite well settled by judicial decisions. And we have no objections to make to this proposition of law except it may be to the form of stating it. The real transaction in all such cases of transfer, sale or conveyance, in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made. The statute authorizing the transfer and declaring its effect is the grant of a new charter couched in a few words, and to take effect upon condition of the surrender or abandonment of the old charter; and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment." It was accordingly held in that case that the charter of the transferees was taken subject to constitutional provisions which had been enacted after the grant of the charter to the original corporation.

Different Methods of Transfer. (1.) Sale.—If the sale of franchises is authorized by the articles of incorporation the transfer may be lawfully effected, although the objects contemplated should be entirely defeated: *Mahaska County R. R. Co. v. Des Moines etc. R. R. Co.*, 28 Iowa, 437. But the powers granted are, as already remarked, strictly construed. Hence if the legislature has only conferred power to "lease or purchase any part or all of any railroad constructed by any other company," contracts to sell, or dispose of their franchises or property are deemed invalid, if entered into before such roads have been actually constructed: *Clarke v. Omaha etc. R. R. Co.*, 4 Neb. 458. So, too, a transfer of franchises is not authorized by a law allowing a lease of completed roads: *Pittsburgh etc. R. R. Co. v. Bedford*, 81* Pa. St. 104. Nor does authority to "purchase, lease, hold and maintain any other railroads, with all the rights, powers and franchises connected therewith" confer upon other companies an implied power to sell: *State v. Consolidation Coal Co.*, 46 Md. 1; though it is plain that authority to purchase the franchises of another specified corporation must be construed as giving the latter an implied authority to sell those franchises: *New York etc. R. R. Co. v. New York etc. R. R. Co.*, 52 Conn. 274. On the other hand it has been held

that a statute authorizing the transfer of franchises to another corporation, with no increase of such franchises, is not a grant of such a character as requires the same rule of strict construction as is applied where the state creates franchises, or is granting rights for the first time: *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 130; but the doctrine here enunciated seems to introduce a very dubious exception to the general rule regarding such grants. The appellate court, in reviewing the decree of the chancellor in the above case, refused to adopt it, and declared not only that what was not clearly granted in such cases was withheld, but that every doubt as to the meaning of the grant was to be resolved, so that any ambiguity in the terms of such a grant must operate in favor of the public and against the corporation: *Black v. Delaware etc. Canal Co.*, 24 N. J. Eq. 455.

Although a corporation may be formed to carry on a certain business only, yet if the legislature permits it to acquire the property and franchises of another corporation, such acquisition will *ipso facto* invest the first corporation with the powers conferred by the statutes regulating the class of corporations to which the corporation party with its property belongs: *Rogers v. Oxford etc. Ry. Co.*, 2 De Gex & J. 662.

3. *Transfer by Enforcement of Mortgage Liens.*—It is sufficiently obvious that legislative authority to mortgage the franchises of a corporation carries with it an implied authority to make the mortgage effective by bringing those franchises to a sale, and transferring them with the tangible property of the corporation to the purchaser: *New Orleans etc. R. R. Co. v. Delamare*, 114 U. S. 501; *Detroit v. Mutual Gas Light Co.*, 43 Mich. 594. The only limitation to the exercise of the right, when power to mortgage franchises is given in general terms, is that the money borrowed is needed for the legitimate purposes of the company: *Savannah etc. R. R. Co. v. Lancaster*, 62 Ala. 555.

The power of absolute sale necessarily implies a power to mortgage: *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191; *East Boston etc. R. R. Co. v. Eastern R. R. Co.*, 13 Allen, 422. Authority given in a charter to borrow money, etc., and to execute "such securities in amount and kind" as the corporation may deem expedient, empowers it to mortgage its franchises: *Pierce v. Emery*, 32 N. H. 484. So also the franchise to maintain and operate a road may be pledged or mortgaged under a power conferred in a special act to pledge "the entire road, etc.," and also "the income and resources thereof": *Coe v. Columbus etc. R. R. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518. So it is held that the franchise of taking tolls is to be understood as being included with the road and fixtures of a turnpike company, and may be lawfully mortgaged under a special act permitting a mortgage of the road and other property of the company: *Joy v. Jackson etc. Plank Road Co.*, 11 Mich. 155. In the latter case the court seems to have been influenced to some extent by the fact that the legislature had indicated that alienations or transfers of franchises were not contrary to the public policy of Michigan, inasmuch as franchises had been made by statute subject to execution. On the other hand, it is held that authority to mortgage the property of a corporation does not confer a power to mortgage its franchises: *State v. Morgan*, 28 La. Ann. 482; and the same inference has been drawn where the authority given was to mortgage the "road, income and other property" of a railroad company. *Pullan v. Cincinnati etc. R. R. Co.*, 4 Biss. 42. If no authority has been given to mortgage franchises, but a mortgage of the real estate of the corporation is allowed, a mortgage covering both franchises and

real estate is merely inoperative as regards the former and valid as regards the latter: *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43.

Power to pledge the franchises and rights of a corporation implies, as incident thereto, the power to pledge everything that may be necessary to the enjoyment of the franchise, and upon which the real value depends. By such a mortgage the railroad is pledged as an entire thing, and subsequently acquired personal property passes under the conveyance: *Phillips v. Winslow*, 18 B. Mon. 431; 68 Am. Dec. 729; *Pierce v. Emery*, 32 N. H. 484; but land cannot pass under a mortgage of "corporate franchises," unless such land becomes subject to a franchise by subordination to it as essential and proper to its enjoyment: *Shamokin etc. R. R. Co. v. Livermore*, 47 Pa. St. 465; 86 Am. Dec. 552.

A mortgage of the corporate existence, however, is not permitted in the absence of a power granted in express and unequivocal terms. This rule is adhered to even in the courts of Vermont, which, as we have seen, have gone so far as to deny the soundness of the ordinary doctrine as to the non-transferability of franchises, except in the case of the nonprerogative franchises: *Eldridge v. Smith*, 34 Vt. 484; *Miller v. Rutland W. R. Co.*, 36 Vt. 452. Those cases hold that the mortgage of a road and its franchises embrace only such rights and privileges as are involved in the owning, maintaining, and operating of the road, and in the receipt and enjoyment of the income and emoluments derived therefrom. Authority to mortgage the "means, property and effects" of a corporation does not empower it to transfer its franchise to be a corporation, but only those franchises and privileges which will enable the grantee to have the same use and beneficial enjoyment of the property which the company itself had: *Meyer v. Johnston*, 53 Ala. 237; nor will power to borrow money necessary to complete a road carry with it a power to mortgage its corporate existence, or any prerogative franchise vested in it: *Bardstown etc. R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199; 81 Am. Dec. 541.

If a mortgage is given upon the "roads, lands and franchises" of a railroad company, the corporate franchise will be regarded as one of those mortgaged, if the legislature has also provided that the purchasers at the foreclosure sale may organize themselves into a corporation, and continue to carry on the business in the same manner as the mortgagor corporation had done: *St. Paul etc. R. R. Co. v. Parcher*, 14 Minn. 297. On the other hand a mortgage of "all the franchises and rights" of a plank road company was held, in *Joy v. Plank Road Co.*, 11 Mich. 55, not to cover the corporate franchise, the court concluding that this exception was a necessary inference from the terms of the Michigan statute, allowing the sale on execution of the franchise of any corporation authorized to receive tolls, but providing at the same time that the corporation should "in all other respects retain the same powers, and be bound to perform the same duties, and liable to the same penalties and forfeitures as before."

Incorporation of Purchasers at Foreclosure Sale.—A provision found in most, if not all, of the statutes allowing the franchises of a corporation to be mortgaged, is that the purchasers at the foreclosure sale may organize themselves into a new corporation with all the powers, rights, privileges, etc., of the one whose franchises have been sold. Unless such provision is expressly made such purchasers do not become a corporation: *Joy v. Jackson etc. Plank Road Co.*, 11 Mich. 155; *Wellsborough etc. Plank Road Co. v. Griffin*, 57 Pa. St. 417; *Commonwealth v. Central Passenger Ry.*, 52 Pa. St. 506, and cases cited in the preceding subdivision. This is by far the most frequent manner

of transferring the corporate franchise, and the cases dealing with the effect of such transfers are numerous. The wording of the statutes varies to some extent in the different states, but the courts have steadfastly refused to recognize any other theory than the one enunciated in the passage quoted above from *State v. Sherman*, 22 Ohio St. 411, viz., that the transaction is essentially a surrender and a re-grant of the corporate franchise. This doctrine involves some important consequences as to the relations between the new corporation and the state. Thus, it is held that the corporate franchise passes to the new corporation, and not to the individuals who compose it. The new corporation, therefore, will be subject to the same legislative control as the old: *Richardson v. Sibley*, 11 Allen, 65; 87 Am. Dec. 700. So, also, it will follow that as the corporate franchise is deemed to be granted anew, the second corporation will be regarded as amenable to any statutes or constitutional provisions which may have been enacted since the original corporation was chartered: *Trask v. Maguire*, 18 Wall. 391; *State v. Sherman*, 22 Ohio St. 411; *Railroad Co. v. Georgia*, 98 U. S. 359; *Atkinson v. Marietta etc. R. R. Co.*, 15 Ohio St. 21. In *St. Paul etc. R. R. Co. v. Parker*, 14 Minn. 297, however, it was held that a constitutional prohibition against passing special acts had not been contravened where the state, to which a mortgage of the franchises of a railroad company had been made, became the purchaser at the foreclosure sale, and subsequently transferred the franchises by statute to a second corporation, the theory being that this was not a case where corporate franchises were brought into existence for the first time, but merely one where such franchises, already in existence and held by the state as property, without merger in its general sovereignty, and without extinguishment, were transferred to the persons enumerated in the act. It seems difficult to reconcile this ruling with the usual conception that the transfer of a corporate franchise is essentially a second grant of such franchise. The nature of the transaction does not seem to be changed by the fact that the state itself was the purchaser, for the foundation of the principle is that the franchise must in any case pass through the state before it vests in the new corporation, and whether it is acquired by an assumed surrender or by an actual purchase seems quite immaterial. Under ordinary circumstances, at any rate, an act passed to enable mortgage creditors of a certain railroad to become a corporation is a special act: *Atkinson v. Marietta etc. R. R. Co.*, 15 Ohio St. 21.

Laws allowing the purchasers at a foreclosure sale to form a new corporation are not intended to prevent a sale or transfer to a corporation already formed, and capable, under the law of its creation, of holding the corporate property and exercising the franchises which pass to the purchaser by the sale: *People v. Brooklyn etc. Ry. Co.*, 89 N. Y. 75.

In no case can the franchise be divided, it must be sold entire. Therefore a mortgage and sale of separate divisions of a railroad, with its rights and franchises, does not bring into existence several companies invested with those rights and franchises: *State v. Morgan*, 28 La. Ann. 482; *Muller v. Dows*, 94 U. S. 444.

It has been stated that these transactions are all dominated by the unvarying principle that "a grant of corporate existence is never implied," and that "in the construction of a statute every presumption is against it": *Central R. R. etc. Co. v. Georgia*, 92 U. S. 665. Hence statutory permission to mortgage franchises cannot be regarded as an implied permission to the purchasers at the foreclosure sale to organize themselves into a corporation: *Wellsborough etc. Plank Road Co. v. Griffin*, 57 Pa. St. 417. But from the na-

ture of the case it is reasonable that this strict doctrine should be applied only to those cases in which it is doubtful whether the power has been bestowed at all. If that is not questioned, the courts are apparently disinclined to rule that the benefits of the purchase shall, in this regard, be lost merely on the ground that there have been some informalities in the organization of the new corporation. In this respect such purchasers occupy a more favored position than one receiving an original grant of corporate rights: *Commonwealth v. Central Passenger Ry. Co.*, 52 Pa. St. 506.

Where the rights of the state itself are not concerned, the rule of strict construction is entirely disregarded or even applied for the benefit of the purchasers. Thus in *Hammock v. Loan and Trust Co.*, 105 U. S. 77, it was held that an Illinois statute declaring that lands purchased at decretal sales should be susceptible of redemption within a certain period did not operate in cases in which the real estate, franchises and other property of a railroad company had been mortgaged as an entirety. The court was of the opinion that the mortgaged real estate to which the right of redemption attached was intended to be, or at least must be presumed to be, such and such only as could, at law, have been levied upon and sold under execution, though considerable weight was at the same time given to the consideration that to infer the existence of such a right would prove disastrous to everyone concerned, and possibly defeat the ends for which the corporation was created.

Purchasers Incorporating Are Not Liable for the Debts of the Original Corporation.—The effect of the statutes allowing the mortgage creditors to organize a new corporation does not invest them with the corporate existence of the mortgagor. That existence continues until it is terminated by the state: *Atkinson v. Marietta etc. R. R. Co.*, 15 Ohio St. 21; *Gulf etc. Ry. Co. v. Morris*, 67 Tex. 692. A necessary corollary to this doctrine is that the new corporation holds the property and franchises transferred to it free from all debts of the original corporation which were not prior liens thereon, unless an obligation to pay such debts is expressly assumed: *Bruffett v. Great W. R. R. Co.*, 25 Ill. 353; *Cook v. Detroit etc. Ry. Co.*, 43 Mich. 349; *Hatcher v. Toledo etc. R. R. Co.*, 62 Ill. 477; *Steiner's Appeal*, 27 Pa. St. 313; *Memphis Water Co. v. Magens*, 15 Lea, 37; *Gulf etc. Ry. Co. v. Newell*, 73 Tex. 324; 15 Am. St. Rep. 788; *Gulf etc. Ry. Co. v. Morris*, 67 Tex. 692; *Vilas v. Milwaukee etc. Ry. Co.*, 17 Wis. 497. The mere fact that, previous to the foreclosure sale, an agreement is made, by the terms of which the unsecured creditors of the original company are entitled to come in as stockholders in the new company does not change this result. Even though the agreement speaks of the reorganization of the old company, such a state of facts must be taken to show the reorganization of a new company so far as the claims of such creditors are concerned: *Smith v. Chicago etc. Ry. Co.*, 18 Wis. 21. The mortgagees take the property subject to such duties or incumbrances as the law attaches to its enjoyment, but not to such as exist against the corporation without reference to such property: *Joy v. Jackson etc. Plank Road Co.*, 11 Mich. 155. Hence, after taking possession of the road, they are subject to all the liabilities incidental to the exercise of the franchise and the operation of the road: *Daniels v. Hart*, 118 Mass. 543; but actual possession must be shown to make them liable for the operation of the road between the time of the purchase and the reorganization: *Pittsburgh etc. Ry. Co. v. Fierst*, 96 Pa. St. 144.

Transfer of Franchises by Judicial Sales.—It has already been stated that franchises cannot be alienated without express statutory authority, but a general power to alienate franchises necessarily implies a liability to have them levied upon: *National Foundry Works v. Oconto W. Co.*, 52 Fed. Rep.

43. Whenever a statutory provision of this kind exists the extent, as well as the mode, of the levy and sale is limited thereby. Hence, if the law refers merely to an execution sale of the franchises and privileges of a corporation, a franchise held by an individual cannot be levied upon: *Gregory v. Blanchard*, 98 Cal. 311. So, also, if notice to a receiver of tolls on a turnpike road is prescribed as a part of the proceedings in a levy on the franchise of the turnpike company, the provision as to such notice must be strictly followed: *Seymour v. Milford etc. Turnpike Co.*, 10 Ohio, 476.

The results of judicial sales of franchises for the benefit of the general creditors are determined upon principles analogous to those which prevail in the case of judicial sales at the instance of mortgagees. Thus, an execution sale of railroad franchises and property does not destroy the corporate existence of the corporation: *Gulf etc. Ry. Co. v. Newell*, 73 Tex. 334; 15 Am. St. Rep. 788; *James v. Pontiac Plank Road Co.*, 8 Mich. 91; *Palestine v. Barnes*, 50 Tex. 538. Nor will the purchasers of railroad property and franchises at the sale of an assignee in bankruptcy acquire the corporate franchise: *Chaffee v. Ludeling*, 27 La. Ann. 607; *New Orleans etc. R. R. Co. v. Delamore*, 114 U. S. 501; even though the statute authorizes those purchasers to organize a new corporation: *Metc v. Buffalo etc. R. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201.

Leases of Corporate Franchises are not less invalid than a complete alienation thereof, where either the lessor or the lessee has not been expressly authorized by statute to enter into such a lease: *Thomas v. R. R. Co.*, 101 U. S. 71; *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.* 118 U. S. 290; *Oregon Ry. v. Oregonian Ry.*, 130 U. S. 1; *Pittsburgh etc. Ry. Co. v. Keokuk Bridge Co.*, 131 U. S. 371; *State v. Atchison etc. R. R. Co.*, 24 Neb. 143; 8 Am. St. Rep. 164; *Shrewsbury etc. Ry. Co. v. Northwestern Ry. Co.*, 6 H. L. Cas. 113; *Archer v. Terre Haute etc. R. R. Co.*, 102 Ill. 493. Sanction to lease cannot be implied; it must rest upon a clear expression of the legislative intent: *Stewart v. Lehigh etc. R. R. Co.*, 38 N. J. L. 513. Such a sanction therefore cannot be inferred from a general statute allowing persons to incorporate: *Lakin v. Railroad Co.*, 13 Or. 436; 57 Am. Rep. 25, citing *Abbott v. Johnstown etc. R. R. Co.*, 80 N. Y. 27; 36 Am. Rep. 572; though such law may give authority to organize "for any lawful business," etc., including the making or constructing a railroad," and "to purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation": *Oregon Ry. v. Oregonian Ry.*, 130 U. S. 1. In this case the court also held that a provision in a special act granting certain privileges to one of the companies, and providing that said corporation "or its assigns" should have no power to sell, convey or assign the rights so granted to any person or corporation, save only as a part of its railway, could not be construed as a recognition of a power to lease. Nor will such power be implied from a statute authorizing companies to contract with each other for the use of their respective roads for transportation purposes: *Thomas v. Railroad Co.*, 101 U. S. 71; *Troy etc. R. R. Co. v. Boston Hoosac Tunnel etc. R. R. Co.*, 86 N. Y. 107. Nor will legislative authority to the railroad companies of a state to "consolidate their stock with the stock of railroad companies of the same or other states, and to connect their roads with the roads of the said companies," warrant a sale or lease of the line, or a part of it, to a foreign corporation: *Board etc. of Tippecanoe County v. Lafayette etc. R. R. Co.*, 50 Ind. 85. Compare *Archer v. Terre Haute etc. R. R. Co.*, 102 Ill. 493. Nor will authority to lease a road validate a lease of an unfinished road: *Pittsburgh etc. R. R. Co. v. Bedford*,

81* Pa. St. 104. In *State v. Richmond etc. R. R. Co.*, 72 N. C. 634, it was held that a statutory authority to "farm out" the right of transportation was equivalent to a power to lease, but Mr. Justice Bynum delivered a clear and well-reasoned dissenting opinion, in which he showed that the phrase in question was derived from the charters of English railroad companies, and simply implied the grant of permission to other companies to use the line by running their own cars over it. We venture to think the learned judge was entirely correct in the view which he took, and that the case falls within the principle announced in *Thomas v. Railroad Co.*, 101 U. S. 71, and *Troy etc. R. R. Co. v. Boston Hoosac Tunnel etc. R. R. Co.*, 86 N. Y. 107, referred to above. To attach to the phrase "farm out the right of transportation," any other meaning than that of the grant of "running powers," seems to be an unwarrantable and dangerous laxity of interpretation, and one which is probably without a precedent in this class of cases.

If a contract really amounts to a lease, it will be treated as such, and declared void, unless entered into under proper legislative authority, as where the entire control of a road, with all its franchises, was transferred, the corporation owning it receiving in return only a fixed rent payable in the form of a dividend to its stockholders: *Middlesex R. R. Co. v. Boston etc. R. R. Co.*, 115 Mass. 347. In *McCauley v. Givens*, 1 Dana, 261, the lease of a ferry by order of a court of chancery was treated as valid, though no express statutory authority had been conferred, but the lease seems to have been merely a method of sequestrating the tolls, which, as has already been stated, was always within the power of such a court.

The principle that a lease of franchises without legislative authority is invalid is the foundation of the rule which leaves the liability of the lessor for any breach of duty to the public precisely the same after as before the attempted delegation of powers, the lessee being regarded for this purpose merely as the agent of the lessors: *Lukin v. Railroad Co.*, 13 Or. 436; 57 Am. Rep. 25; *Gulf etc. Ry. Co. v. Newell*, 73 Tex. 324; 15 Am. St. Rep. 788; *Ohio etc. R. R. Co. v. Dunbar*, 20 Ill. 623; 71 Am. Dec. 295; *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464; 48 Am. Rep. 574, and the cases cited in the notes appended in this series to the last two cases.

Transfer of Franchises by Consolidation of Corporations.—This subject is treated at length in the note to *McMahan v. Morrison*, 79 Am. Dec. 421.

Transfer of Some Particular Franchises—Power of Eminent Domain.—That the right to appropriate property for corporate purposes, upon payment of damages, is a franchise incapable of transfer without legislative authority is well settled: *Atkinson v. Marietta etc. R. R. Co.*, 15 Ohio St. 21; *Coe v. Columbus etc. R. R. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518. An ordinary lease of a railroad therefore does not vest in the lessee any power to exercise the right of eminent domain: *Mayor of Worcester v. Norwich etc. R. R. Co.*, 109 Mass. 103; *Petition of New York etc. R. R. Co.*, 99 N. Y. 12. On the other hand, if franchises of a railroad corporation are allowed by statute to be sold, the right of eminent domain will pass among them to the purchaser: *New Orleans etc. R. R. Co. v. Delamore*, 114 U. S. 501; *Lawrence v. Morgan's Louisiana etc. Co.*, 39 La. Ann. 427; 4 Am. St. Rep. 265; but not the right to have the damages assessed in a particular way by special proceedings under a special statute applicable to the first corporation: *Little Rock etc. R. R. Co. v. McGehee*, 41 Ark. 202. So also the purchasers at a judicial sale of an unfinished railroad, who by charter succeed to all the estate and property of the original company, and to "all its contracts, franchises, rights,

privileges, and immunities," acquire thereby the right of eminent domain: *North Carolina etc. R. R. Co. v. Carolina Central R. R. Co.*, 83 N. C. 489; but if the various divisions of a road are sold to different purchasers, the right of eminent domain cannot be parceled out among them: *State v. Morgan*, 28 La. Ann. 482. Nor can a railroad corporation transfer the right to a private person so as to enable him to construct and maintain a road for his private use and benefit: *Stewart's Appeal*, 56 Pa. St. 413; *Fanning v. Osborne*, 102 N. Y. 441. From the principle that a lease does not deprive the lessor of the power of exercising the right it follows that proceedings to condemn property should be brought in the name of the lessor: *Kip v. New York etc. R. R. Co.*, 67 N. Y. 227; *Dietrich v. Lincoln etc. R. R. Co.*, 13 Neb. 361. But a corporation, after having commenced such proceedings, cannot sell and transfer to another corporation its right to prosecute them: *Mahoney v. Spring Valley Water Co.*, 52 Cal. 161.

Right to Receive Subscriptions from Municipal Bodies.—The power given to county courts or other municipal bodies to take and subscribe for stock in railroads is intended as a privilege for the corporation: *Smith v. Clarke County*, 54 Mo. 58; *State v. Greene County*, 54 Mo. 540. Whether a second corporation, which acquires the property and franchises of the one which possesses such a privilege will itself receive the benefit of the privilege, depends upon whether the privilege has become a vested right or not. In the former case, the privilege will pass to the transferee, as, for example, to the corporation formed by the consolidation of the holder of the privilege with another: *County of Scotland v. Thomas*, 94 U. S. 682; approving *State v. Greene County*, 54 Mo. 540. Nor will an amendment to the constitution prohibiting such subscriptions without a popular vote take away the privilege, when once vested: *Calloway County v. Foster*, 93 U. S. 567, *State v. County Court*, 51 Mo. 522; *State v. Greene County*, 54 Mo. 540; *State v. Macon County Court*, 41 Mo. 453. But an unexecuted power of this sort does not pass to a corporation formed by the consolidation of two others: *State v. Garoutte*, 67 Mo. 445; as where the electors of a township authorize a county court to subscribe to a railroad, but the corporation which is to receive the subscription is absorbed in another before the subscription is made. In such a case the county court is regarded as the mere agent of the electors, and no vested rights subsist until the subscription is actually made: *Harshman v. Bates County*, 92 U. S. 569.

Immunity from Taxation.—The authorities are apparently in conflict as to whether immunity from taxation is a franchise. The cases in which it is spoken of as a franchise are *Home of the Friendless v. Rouse*, 8 Wall. 430; *State v. Minnesota Cent. Ry. Co.*, 36 Minn. 246; *St. Paul etc. R. R. Co. v. Parcher*, 14 Minn. 297. On the other hand in the leading case of *Morgan v. Louisiana*, 93 U. S. 217, Mr. Justice Field seems to discountenance this theory, using the following language: "Much confusion of thought has arisen in this case, and in similar cases, from attaching a vague and undefined meaning to the term, 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a franchise, and is supposed to pass upon a transfer of the franchises of the company.

"But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights and privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appro-

private earth and gravel for the bed of its road, or water for its engines and the like. They are positive rights and privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction." In that case, accordingly, it was decided that a purchaser at a foreclosure sale made by virtue of a mortgage upon the property and franchises of a railroad company did not carry to the purchaser the immunity from taxation which the company had enjoyed. In deference to this case it has been held that such immunity will not pass by a charter granting a railroad company all the "rights, powers, and privileges" of another company: *Railroad Co. v. Gaines*, 97 U. S. 697; and that the use of the word "franchises" in the statute or instrument by which the property and rights of one company pass to another will not release the latter from the duty to pay taxes: *State v. Maine Cent. R. R. Co.*, 66 Me. 488; *Railroad Co. v. County of Hamblen*, 102 U. S. 273; *Louisville etc. R. R. Co. v. Palmes*, 109 U. S. 244; *Wilson v. Gaines*, 103 U. S. 417; *Memphis etc. R. R. Co. v. Commissioners*, 112 U. S. 609.

Transfer of Property Essential to the Exercise of Franchises.—In the cases in which the transferability of franchises comes under discussion in the courts, the transferability of property connected with the exercise of the franchises is ordinarily involved. The general rule as to private corporations is that they may sell all their property: *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; 66 Am. Dec. 490; *Leggett v. New Jersey etc. Co.*, 1 Saxt. Ch. 541; 23 Am. Dec. 728, and note; *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672; *State v. Western Irrigating Co.*, 40 Kan. 96; 10 Am. St. Rep. 166; *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300; *De Camp v. Alward*, 52 Ind. 468; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279. The principle of these cases is that the charter and franchises are not an incident annexed to and passing with the property transferred: *Bruffett v. Great W. R. R. Co.*, 25 Ill. 353, and that the corporate franchise remains vested in the corporators till it has been abandoned or forfeited: *Nietam v. Hay*, 122 Ill. 293; 3 Am. St. Rep. 492; *Black v. Canal Co.*, 24 N. J. Eq. 465; *Memphis R. R. Co. v. Commissioners*, 112 U. S. 609; *Coe v. Columbus etc. R. R. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518.

But this rule applies in its full extent only to purely private corporations, invested with no special privileges except the corporate franchise itself. In the case of quasi public corporations, such as railroad companies, the rule is well settled that property which is essential for the performance of the duties which the corporation owes to the public, or which, as some cases put it, is necessary for the exercise of its franchises, cannot be alienated, either voluntarily or by a forced sale, without legislative authority: *Coe v. Columbus etc. Ry. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518; *Black v. Delaware etc. Canal Co.*, 22 N. J. Eq. 399; *Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Gue v. Tide-Water Canal Co.*, 24 How. 257; *Foster v. Fowler*, 60 Pa. St. 27; *Palestine v. Barnes*, 50 Tex. 538; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27; 42 Am. Dec. 315; *Youngman v. Elmira etc. R. R. Co.*, 65 Pa. St. 286; *Western Pac. R. R. Co. v. Johnston*, 59 Pa. St. 294; *Leedom v. Plymouth R. R. Co.*, 5 Watts & S. 265; *Ammant v. New Alexandria Turnpike Co.*, 13 Serg. & R. 210; 15 Am. Dec. 593; *Steiner's Appeal*, 27 Pa. St. 313; *Winchester etc. Turnpike Co. v. Vimont*, 5 B. Mon. 1; *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24; *Hendee v. Pinkerton*, 14 Allen, 381.

As to the practical application of the rule there is some conflict of authority. Its foundation being the interest which the public has in the discharge of the duties undertaken by the corporation, it would seem that on principle the extent of the power of alienation should not depend in any degree upon whether the property in question has been acquired by the exercise of the right of eminent domain or not. Yet we sometimes find that circumstance mentioned in statements of the rule: *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464; 48 Am. Rep. 574; *Pietz v. Hay*, 122 Ill. 293; 3 Am. St. Rep. 492; *Hendee v. Pinkerton*, 14 Allen, 381. But it is doubtful if there is any authority for the doctrine that corporate property, not acquired by the right of eminent domain, but essential to the exercise of the franchise, is susceptible of alienation. In at least one case, decided by a court of the highest authority (*Plymouth R. R. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526), it was expressly stated that, as regards land, the only test was appropriation to corporate objects, and indispensability for the performance of corporate duties. On this principle it is held that the road-bed and fixtures of a railroad company or a turnpike company are inalienable: *Western etc. R. R. Co. v. Johnston*, 59 Pa. St. 294; *Coe v. Columbus etc. Ry. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518; *Youngman v. Elmira etc. R. R. Co.*, 65 Pa. St. 236; *Leedom v. Plymouth R. R. Co.*, 5 Watts & S. 265; *Ammant v. New Alexandria Turnpike Co.*, 13 Serg. & R. 210; 15 Am. Dec. 593; *Winchester etc. Turnpike Co. v. Vimont*, 5 B. Mon. 1; *Steiner's Appeal*, 27 Pa. St. 313; *Baxter v. Nashville etc. Turnpike Co.*, 10 Lea, 488. But an abandoned road-bed, not in use for any purpose of public service, is not exempt: *Benedict v. Heinberg*, 43 Vt. 231. The only authority inconsistent with those just cited is *State v. Rives*, 5 Ired. 307, which held that the right of way of a railroad company might be levied on because it had an estate therein, and not a mere right of way. If, as seems to be agreed, the obligation to perform public duties is the foundation of the rule usually accepted, this case was plainly decided on an entirely irrelevant ground, and it has, we believe, never been followed. The same doctrine applies to the canal and appurtenances of a canal company: *Gue v. Tide-Water Canal Co.*, 24 How. 257; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27; 42 Am. Dec. 315; to the market-house of one holding a market franchise: *Palestine v. Barnes*, 50 Tex. 538; and to the plant of a water company: *Louisville Water Co. v. Hamilton*, 81 Ky. 517. All the interests which are noticed in these cases are interests in real estate, and the courts seem to have generally denied the quality of inalienability to merely personal property. Thus it has been held that the rolling stock of a railroad company is liable for its debts: *Coe v. Columbus etc. Ry. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518; *Boston etc. Ry. Co. v. Gilmore*, 37 N. H. 410; 72 Am. Dec. 336. In the former case the court thought that "the line could be clearly drawn between the interest in real estate and the franchise connected therewith, and the movable things employed in the use of the franchise." So also a ferry-boat may be levied upon: *Lathrop v. Middleton*, 23 Cal. 257; 83 Am. Dec. 112.

On the other hand it has been held that a company formed for the express purpose of manufacturing and letting cars to railroad companies cannot disable itself for the performance of the duties thus undertaken by transferring all its rolling stock to another corporation, and covenanting not to continue its business as long as the agreement by which the transfer is effected remains in force: *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24. It is difficult to reconcile this decision with those which assert that similar property, when belonging to a railroad company, is subject

to forced sale, except on the unsatisfactory and inconclusive ground that the business of supplying cars in the one case was the sole function of the corporation, which could not be abandoned without an entire renunciation of its public duties, whereas, in the other case, after the alienation of the rolling stock, the corporation still retains the property which will enable it to utilize other rolling stock, when acquired, viz., the road-bed and appurtenances. That the corporation in the latter case is not completely incapacitated for the discharge of its duties is surely not a sufficient reason for refusing to protect its personalty, so far as it is connected with the operation of the road. For reasons of public policy it may be advisable to allow a free disposal of all the property and franchises of a corporation, and the legislation of the various states shows that this is the opinion of the people of this country; but on strict logical grounds it is impossible to maintain in general terms that property essential to the exercise of the franchises is inalienable without legislative authority, and to deny that quality to property so indispensable as rolling stock to the operation of a road. The mere fact that rolling stock is not a fixture seems quite immaterial. In fact, to rely upon such a circumstance is plainly to assume the very point at issue, viz., whether any property except realty is inalienable, and to argue upon the hypothesis that none of the corporate effects except those which are attached to such realty are entitled to protection against creditors. The true test, it is submitted, is rather whether the property in question is essential in any reasonable sense for the discharge of the corporate duties. If it answers that description, it would appear on general principles to be exempt from execution, in the absence of legislative provision, without regard to its character as personalty or realty. The question, however, can rarely again be of practical importance, as such cases are now fully provided for by statute in most, if not all, of the states.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

KAY v. KIRK.

[76 MARYLAND, 41.]

WATERCOURSES—DIVERSION FOR DRAINAGE—INJUNCTION.—An upper proprietor through whose land a stream of water flows will be enjoined from cutting a ditch on such land for the purpose of straightening the course of the stream and protecting his land from overflow, although he returns all the water to its natural channel before it leaves his land, when the effect of such ditch is to divert the water from its natural course, and to so increase the current of the stream as discharged upon the land of the lower proprietor as to seriously and materially injure his milldam by washing out its banks and filling it with mud.

WATERCOURSES—UNLAWFUL DIVERSION OF AND INTERFERENCE WITH.—The owner of a watercourse may divert or change the course of the stream on his own land, provided he returns it to its original or natural channel before it reaches the land of an adjoining owner without injury to the latter; but the former must not, by changing the direction of the flow of the stream, so increase or diminish its velocity as to cause damage to the land of the adjoining proprietor, or impair his rightful use of the stream; nor can he make any change or diversion of the stream, though on his own land, which would cause the washing of mud and debris on the land of his neighbor, to the injury of the latter, and which would not have occurred but for the change in the current of the stream.

Albert Constable, for the appellant.

William S. Evans and T. Warburton, for the appellee.

ALVEY, C. J. The bill in this case was filed by the appellee against the appellant to obtain an injunction to restrain the latter from proceeding to cut a ditch through his meadow, to divert a stream of water from its natural and original course, whereby, as it is alleged, the plaintiff's milldam and water-power below would be greatly affected and irreparably damaged.

The plaintiff and defendant are adjoining landowners on a stream called Stone Run, in Cecil county. The defendant is owner of the upper tract, and the plaintiff of the lower, upon which he has a milldam, and a grist and saw mill in operation. The course of Stone Run is through the lands of both owners, and is, through the meadow land of the defendant, somewhat winding, with several curvatures before it reaches the milldam of the plaintiff. The course of the stream is through a valley, and it is the receptacle of the drainage of a considerable watershed before it reaches the land of the defendant; and in times of heavy floods, which quite frequently occur, caused by rain or melting snow, the stream overflows its banks, and spreads over the meadow land of the defendant. To prevent this he proposes, and has commenced, to cut a ditch through his meadow, and thus straighten the course of the stream, but to intersect the original course of the stream, and to cause the water to flow down on its present bed from the point of intersection, such point being upon the land of the defendant. It is to prevent this, and the diversion of the stream from its natural course as it now exists and runs into the dam of the plaintiff, that the application for an injunction was made by the plaintiff.

The plaintiff charges that the defendant is engaged in cutting a wide channel or ditch along the south side of and within a few feet of the plaintiff's milldam, and through one of the banks thereof and into said dam, for the alleged purpose of preventing the overflow of his meadow; that the said ditch or channel, when completed, will be considerably lower than the banks of the plaintiff's dam, and will divert from and diminish the flow of the water therein, and in times of heavy rains and freshets turn such a volume of water into said ditch or channel as will wash out and totally destroy the whole south side of the plaintiff's milldam; that if the defendant is suffered to make such ditch or channel, and to divert the flow of the stream from its natural course, the plaintiff's water-power will be totally destroyed, his mill property rendered entirely valueless, and his milling business altogether broken up, and that he will thereby suffer irreparable damage, and that he has no adequate remedy at law.

The defendant, by his answer, insists that the making of the ditch is but a reasonable improvement of his property, and that the ditch is located entirely on his own land, and that the water which is taken from the present course of the

stream, at the head of the ditch, and carried over the defendant's land, is all returned undiminished to the present or original bed of the stream before leaving the land of the defendant, and before reaching the milldam of the plaintiff. He denies that the ditch will affect the milldam injuriously, or that it will have any such damaging effect as that charged by the plaintiff.

There has been a large mass of testimony taken, and many witnesses have been examined on both sides. Each party has had made a plat of the premises, and filed it in the case, and much of the testimony on the part of the defendant has been directed to the plat made for the plaintiff, to show that it is inaccurate in several particulars, and that the plat made for the defendant is substantially correct. There was also a good deal of examination to show that the breast of the plaintiff's milldam had been raised some time within the last few years; but the testimony failed to establish this fact with any degree of certainty. At most it appears but as matter of conjecture on the part of some of the witnesses.

The main question presented by the testimony is, whether the completion of the ditch or new channel, as proposed by the defendant, and the diversion of the water from its natural course, but its return to the original bed before leaving the land of the defendant, will either wash out any portion of the banks of the dam, or wash mud and earth into the dam, and thus fill it up, so as seriously to impair its capacity and usefulness; and the strong preponderance of the testimony answers this question in the affirmative.

It is true the lines of intersection of the new channel with the original bed of the stream, at the head of the plaintiff's dam, would not be at right angles; but it would be at such angle, the original bed of the stream being narrow, that the current from the mouth of the ditch, in times of freshets, would be of sufficient velocity and force to tear out the opposite bank of the stream. This is the very decided opinion of many witnesses. If, however, the opposite bank should be strong enough to resist the force of the current from the mouth of the ditch proposed to be made, the testimony shows it to be very probable that the mud and sediment that would be washed from the ditch, if not at once, at least in a short time, would fill up the dam—the dam being small in area, and not of any considerable depth. Quite a number of witnesses, all long and well acquainted with the premises, and with the

character of the stream, and who testify from their observation of the ground, concur in stating that, in their judgment, if the ditch be made as proposed by the defendant, it would be impossible for the plaintiff to keep his dam in repair. As stated by one witness, with whom several others coincide in their testimony: "The current of the ditch, if completed, would pass across the stream and against the opposite bank, into the gully"—(meaning a deep washout near the bank of the stream). "I believe it would break the banks into that gully and divert the water from the stream, and destroy the dam and water-power, and do the plaintiff irreparable damage. In my opinion the dam could not be maintained if the ditch was completed. If it did not divert the water from the stream (which, in my opinion it would do), it would fill the dam with mud, and destroy it in that way. Light floods would fill the dam with mud, and large floods would break the bank and destroy it. The proposed ditch is through a meadow of light loam, which would be washed by a small flood and carried into the dam."

There are several witnesses for the defendant who expressed different and variant opinions from those expressed by the witnesses for the plaintiff, as to the effect of the ditch upon the dam, and the danger likely to ensue to its banks. But, as we have said, the decided preponderance of the evidence is in support of the plaintiff's contention.

The principles of law applicable to the case would seem to be clear. It is settled that the diversion of a stream will not presumptively have any injurious effect as against a riparian owner whose land is situated lower down the stream than the point of diversion, if the water is reconducted to the stream before it reaches his land, and the quantity of water is not sensibly or materially diminished. It was held, in the case of *Embrey v. Owen*, 6 Ex. 353, a leading case in England, that the right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but this is not an absolute and exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorized use of this common benefit that an action will lie. It is certainly the undoubted right of every riparian owner to have the water come to his land in its natural channel, and by its natural flow undi-

minished in quantity, and unimpaired in quality, except to that extent that results from a reasonable use of the water by other owners upon the stream; unless, indeed, such right be restricted or otherwise modified by grant or prescription: Woods Law of Nuisance, sec. 350. But, while it is the clear right of an owner of a watercourse to divert or change the course of the stream on his own land, provided he returns it to its original or natural channel before it reaches the land of an adjoining owner, this must be done in such manner as will not produce injury to the adjoining proprietor, either above or below: *Williams v. Gale*, 8 Har. & J. (Md.) 281. He must not by changing the direction of the flow of the stream so increase or diminish its velocity as to cause damage to the land of the adjoining proprietor, or impair his rightful use of the stream; nor can he make any change or diversion of the stream, though on his own land, which would cause the washing of mud and debris on to the land of his neighbor, to the injury of the latter, and which would not have occurred but for the change in the current of the stream. This principle is well illustrated by the decision in the case of *Gerrish v. Clough*, 48 N. H. 9; 2 Am. Rep. 165; 97 Am. Dec. 561. In that case the action was for diverting the current of a stream, by reason of which the plaintiff's land was washed away. The defendant, owning land on one side of the stream, built a breakwater to prevent the water's encroaching upon his land, which had the effect to throw the current over upon and wash away the plaintiff's land opposite. It was held, that a riparian proprietor, for his own protection or convenience, has no right to build anything which in times of ordinary flood will throw the water on the grounds of another proprietor, so as to overflow and injure them. One may, say the court, protect his own property; but though the water may overflow or encroach upon your land, you cannot protect your land to the prejudice or injury of your neighboring proprietor. And for this general principle: Angell on Watercourses, secs. 330-334, is cited.

In this case it is clearly shown, that by making the ditch through the meadow of the defendant, though he would thereby straighten the course of the stream, and would thus protect his meadow, at least to some extent, against the overflow of the stream in times of high water, yet the current of the stream would be given an impetus and strength that would certainly be damaging to the milldam of the plaintiff at times

of flood. This the law does not sanction; and the learned judge below was entirely right in making the injunction perpetual. The order appealed from must therefore be affirmed, with costs to the appellee.

Order affirmed.

WATERS AND WATERCOURSES—INJURIES CAUSED BY DIVERSION OF STREAM.—A riparian proprietor is liable for any damages to the land of another caused by his making a change in the natural flow of the stream: *Tillotson v. Smith*, 32 N. H. 90; 64 Am. Dec. 355; *Omelvany v. Jagers*, 2 Hill, 634; 27 Am. Dec. 417. The question as to the liability of riparian owners for injuring adjoining lands has generally arisen under circumstances resembling those in *Gerrish v. Clough*, 48 N. H. 9; 2 Am. Rep. 165; 97 Am. Dec. 561. Illustrations of the doctrine there adopted will be found in *Burwell v. Hobson*, 12 Gratt. 322; 65 Am. Dec. 247; *Oasebeer v. Mowry*, 55 Pa. St. 419; 93 Am. Dec. 766; *McCoy v. Dauley*, 20 Pa. St. 85; 57 Am. Dec. 680, and note; *Cowles v. Kidder*, 24 N. H. 364; 57 Am. Dec. 287; *Brown v. Bowen*, 30 N. Y. 519; 86 Am. Dec. 406; *Bell v. McClintock*, 9 Watts, 119; 34 Am. Dec. 507; *Roundtree v. Brantley*, 34 Ala. 544; 73 Am. Dec. 470; *Borchardt v. Wausau Boom Co.*, 54 Wis. 107; 41 Am. Rep. 12; *Farris v. Dudley*, 78 Ala. 124; 56 Am. Rep. 24; *McKee v. Delaware etc. Canal Co.*, 125 N. Y. 353; 21 Am. St. Rep. 740. An upper proprietor is also liable for the injuries caused to the land of a lower one by the removal of a ledge of rock from the bed of the stream: *Grant v. Kuglar*, 81 Ga. 637; 12 Am. St. Rep. 348. That an injunction may issue to prevent injuries resulting from the additional flow of water caused by the erection of a dam: See *Sheldon v. Rockwell*, 9 Wis. 166; 76 Am. Dec. 265; *Farris v. Dudley*, 78 Ala. 124; 56 Am. Rep. 24.

FLACK v. GOSNELL.

[76 MARYLAND, 88.]

COTENANCY—LIEN FOR RENTS.—A tenant in common has no lien against his cotenant's interest in the common property for rents in excess of his share collected and retained by such cotenant before partition.

COTENANCY—LIABILITY OF COTENANT FOR RENTS COLLECTED.—The claim of one cotenant for his share of rents collected and retained by another, is recoverable at law, and suit may be instituted therefor at any time, but such claim creates no lien on the undivided interest in the land of the tenant collecting the rents.

COTENANCY—LIABILITY OF COTENANT FOR RENTS COLLECTED WITHOUT EXPRESS AUTHORITY.—The fact that one cotenant assumes the right or duty to collect the rents arising from the common property without being made a bailiff by express authority, does not change the nature of his cotenant's claim for his share of such rents, nor subject the former to any other or greater liability for the rents so collected by him than if he had been duly and fully authorized to collect them.

William E. Hoffman, for the appellants

Frank Gosnell and Thomas M. Lanahan, for the appellee.

IRVING, J. The facts of this case are as follows: Thomas J. Flack died in 1874 seised and possessed of the reversions in fee of several lots of ground in the city of Baltimore, out of which rents issued amounting, in the aggregate, to three hundred dollars and fifty cents annually. His heirs at law consisted of two sons, a daughter, and some grandchildren, the children of a deceased child. One of his sons, James W. Flack, becoming involved, made an assignment for the benefit of his creditors, to Frank Gosnell (the appellee) of all his estate, which included his undivided interest in his father's estate.

The bill is for partition of this real estate among the heirs at law of the intestate; and, among other things, charges that James W. Flack had collected all the rents from this real estate, and had not accounted for them to his cotenants; and, among other things, prays that in such petition they may "have the interest and estate of said James W. Flack in said parcels of ground and premises, as well against him as also said Frank Gosnell (trustee under said deed of trust), held and made liable for and applied toward the satisfaction of the rents collected, received and appropriated as aforesaid." In other words, the bill prays that James W. Flack's interest in the undivided real estate shall be impounded for the payment to the several heirs of their interests in the rents of the estate collected by him.

To so much of the bill as seeks thus to subject the undivided interest of James W. Flack in this property, or its proceeds after sale thereof, to the payment of any rents collected and retained by James W. Flack in excess of his share thereof, the appellee demurred.

The court sustained the demurrer, and the only question on this appeal is whether the ruling of the circuit court was right.

As curtly stated by the appellee in his brief, the question is, has one tenant in common a lien against his cotenant's interest in the property for rents in excess of his share collected and retained by such cotenant before partition of the land?

The counsel for appellants has exhibited most commendable industry and research in the collection of authorities supposed to sustain his contention. Some of his citations from other states do seem to sustain his view, but they do not commend themselves to us as resting on solid ground of reason and equity. They are certainly not in harmony with the

law as it prevails in England, and as it has been understood and adopted in this state. The several text-books cited by the appellant, viz., Freeman on Cotenancy, Moak's Underhill on Torts, and Story's Equity, according to our understanding of them, do not support the view for which the appellants' counsel contends; while Mr. Jones, in his work on Liens, vol. 2, p. 96, sec. 1155, says expressly, that such lien as that claimed by the bill and in argument does not exist. The only reason, he says, for enforcing it for improvements put on the land rests on the doctrine of contribution, and arises from the necessity of preserving the estate or enhancing its value for the benefit of the joint owners. Judge Story says that, strictly speaking, no lien exists even for repairs and improvements, but equity compels compensation in that case before partition of the land.

Mr. Jones, in the section cited, says: "There is no reason why there should be a charge or encumbrance upon the interest of one joint owner to satisfy a claim of his cotenant for rents and profits received. The right to partition exists, and may be enforced, and, pending the action therefor, the chancellor may amply protect the rights of each joint owner by placing the land in the hands of a receiver. But it is not the policy of the law to enforce liens upon the interest of one joint owner of land in favor of another for unadjusted, and, to innocent purchasers and creditors, often unknown accounts for rents and profits." Similar reasons are most forcibly assigned by Judge Lewis, in *Burch v. Burch*, 82 Ky. 622, the reasoning and conclusion in which are adopted in *Clark v. Hershy*, 52 Ark. 492. The interest of James W. Flack in this real estate of his father was, like that in any other real estate he owned, liable to be sold or mortgaged, and would be subject to the lien of any judgment obtained against him. The fact that it was an undivided interest would make no difference in its liability in these respects. No good reason has been suggested why such an interest should be subjected to secret liens, which the general policy of the state discountenances, with any more readiness by a court of equity than any other real estate. The claims of the several cotenants for their share of the rents received by James W. Flack were recoverable by law; and suit could have been instituted therefor at any time. The act of IV Anne, chapter 16, is in full force in this state; and its twenty-seventh section makes express provision for such a case; but it gives no lien on the undivided interest in

the land of the tenant collecting the rents. The fact that James W. Flack assumed the right or duty of collecting the rents during all those years, in which it is charged he received them without being made a bailiff by express authority, does not change the nature of appellants' claim, nor subject James W. Flack to any other or greater liability for the rents so collected by him than if he had been duly and fully authorized to do all that he did do.

We think the case entirely covered by what this court said in *Devries v. Hiss*, 72 Md. 560; and we see no reason for departing from what the court said in that case.

In it the court did lay hands on the share of P. Hanson Hiss in the estate for the payment of the rents and profits he had collected, but they did so because the estate which he took under his father's will was an equitable estate, and not a legal one. The whole question turned upon the inquiry whether his estate was equitable or legal; and the court decided it was an equitable estate, and therefore could be subjected in a court of equity to the payment, to the several cotenants, of their shares of what he had received. The language of the court is: "The equitable interest could be intercepted to make good the defalcation. Mr. Devries took a conveyance from P. Hanson Hiss of his interest subject to this equity, and he cannot claim more than his grantor would have been entitled to receive." If the estate which passed to Gosnell, trustee, had been an equitable estate it would be subjected, as has been asked by the complainants, precisely as Devries' interest was to the payment of his grantor's defalcation to his cotenants; but being a legal estate it cannot be impounded, as asked, without disregarding our decision in *Devries v. Hiss*, 72 Md. 560, and the reasoning which brought us to that conclusion; nor without doing violence to the policy of the state in respect to liens on real estate. The circuit court was clearly right in its ruling on the demurrer, and it will be affirmed.

Affirmed and remanded. —

LIEN OF ONE COTENANT ON THE MOIETY OF ANOTHER.—Whether one cotenant, in the absence of express contract, is ever answerable to another for moneys expended for the benefit of the common property, and, if answerable, whether the liability may be enforced by something which is tantamount to a lien on such property, are questions upon which the courts have not been able to agree. That there is a liability to contribute when one of the cotenants has, at his own expense, removed a common burden from the common property, is quite generally, and, perhaps, universally,

conceded: Freeman on Cotenancy and Partition, sec. 322; *Screen v. Joyner*, 1 Hill Ch. 252; 26 Am. Dec. 199. The right to reimbursement for necessary repairs is also admitted in many of the states: Freeman on Cotenancy and Partition, sec. 261; *Fowler v. Fowler*, 50 Conn. 256; and some of them enforce, in various modes, claims for permanent improvements placed upon the property in good faith. It is not the purpose of this note to treat of the general liability of one cotenant to another. It is restricted to the more limited inquiry as to whether, conceding the liability to exist, may it be enforced against the moiety of the cotenant from whom it is due; or, in other words, has a cotenant who holds an enforceable claim arising out of the common property any lien against it? We use the word "lien" according to the definition given of it by the Civil Code of California, namely: "A charge imposed in some mode, other than by a transfer in trust, upon specific property, by which it is made security for the performance of an act."

The liability of one cotenant to another may be such as is enforceable against the latter personally, or such as is enforceable only against his interest in the property of the cotenancy. In the latter case it is evident that a lien, or something analogous to a lien, must be recognized and enforced, or all liability substantially denied. With respect to cases of this class, there is little or no dissent from the proposition that, a cotenant having enforceable rights is entitled to assert them against the property of the cotenancy.

The only instances, so far as we can remember, in which one cotenant is personally liable to another, arise out of contracts express or implied, and the only implied contract generally recognized is the contract implied in the greater part of the United States, that every cotenant will pay over to his fellow-tenant in common the latter's just share of all moneys received, either upon sales of the common property, or realized as rents and profits thereof. In many of the United States an action of *assumpsit* as for moneys had and received may be sustained against a tenant in common who has received more than his share of the rents and profits of the common property: Freeman on Cotenancy and Partition, secs. 280-284; while in England, and in a few of the United States, this remedy is not available, and a cotenant cannot maintain any action against his fellow-tenant unless it be an action of account: Freeman on Cotenancy and Partition, sec. 285.

In those states in which a cotenant, receiving the rents and profits or the proceeds of sales of the common property, is regarded as liable upon an implied contract to pay over whatever he has received in excess of his share, and where personal liability is therefore conceded, it is doubtful whether there is any remedy other than that of a personal action to recover the amount due. While the question was not much discussed, it has been in several cases determined that as against a cotenant liable for advances made or for rents and profits received, only a personal liability exists, and therefore, that even in a suit for partition or other proceedings in which an accounting was sought, the amount due from him could not be made chargeable against or payable out of the proceeds of his moiety of the common property: *Clark v. Hershey*, 52 Ark. 473; *Burch v. Burch*, 82 Ky. 622; *Taylor v. Baldwin*, 10 Barb. 582; *Flack v. Gosnell*, 76 Md. 88; 35 Am. St. Rep. 413.

Perhaps no case can be found in which the amount due from a cotenant for rents and profits, for moneys received, or for advancements made, has been held a lien in the sense that its payment could be enforced by a suit of foreclosure, with the resulting decree for a sale of the property in satisfac-

tion of the lien. But it is by no means clear that in a suit for partition the tenant in default may have his share set aside to him, irrespective of his obligations to his cotenants. In some of the cases, the existence of an equitable lien is affirmed, and, in our judgment, as a suit for partition is, even when controlled by statute, an equitable proceeding, the court may properly take an account between the cotenants, and if one of them is found indebted to the others for rents and profits, or for moneys received from the subject of the cotenancy, may make the amount of such indebtedness a charge upon his interest, or, at least, refuse to give him relief excepting upon his doing equity by paying or securing the amount to which the others are entitled: *Metcalf v. Hoopingardner*, 45 Iowa, 512; *Pigg v. Carroll*, 89 Ill. 205; *Hannan v. Osborn*, 4 Paige, 336; *Kingsland v. Chetwood*, 39 Hun. 602; *Scott v. Guernsey*, 60 Barb. 163-180; 48 N. Y. 106, 124. That an accounting for rents and profits may be had in every equitable proceeding for partition is beyond controversy: *Hill v. Fulbroch*, 1 Jacob, 594; *Lorimer v. Lorimer*, 5 Madd. 363; *Story v. Johnson*, 2 Y. & C. Eq. Ex. 594; *Davidson v. Thompson*, 22 N. J. Eq. 84; *Goodenow v. Ewer*, 16 Cal. 472; 76 Am. Dec. 540; *Humphrey v. Foster*, 13 Gratt. 657; *Rust v. Rust*, 17 W. Va. 901; *Scrattin v. Allison*, 32 Kan. 379; *Bridgesford v. Barbour*, 80 Ky. 529. It is true that these cases do not affirm, in direct terms, that the amount found due upon such accounting shall be charged as a lien against the moiety of the cotenant in arrears, or deducted from moneys due him for his share of the proceeds of the sale of the property. It is, however, the practice of courts of equity to make their decrees effective, and we cannot conceive that, after taking an account, they will turn the property over to a cotenant in default, leaving the account unsecured and unsatisfied.

There appears to be no doubt that tenants in common may by express contract not only create a personal liability in favor of one of their number as against another, but that they may also by appropriate language in such contract create a lien against the interest of the one who, as the result of such contract, shall become indebted to the other: *Houston v. McCluney*, 8 W. Va. 135. In one instance a lien was held to exist on account of improvements placed upon the property pursuant to an agreement between the cotenants, though the lien was not stipulated for in direct terms: *Baird v. Jackson*, 98 Ill. 78. Probably this decision was not intended to apply specially to improvements constructed by agreement, but to be in harmony with the general policy of the courts of the state by which improvements, when placed on the property in good faith, are held to be proper subjects of compensation, whether sanctioned by express agreement or not.

The general policy of registration laws in the United States is to protect innocent purchasers against all liens upon, and interests in, real property not capable of ascertainment by an examination of the public records of the county in which it is situate. Therefore, an innocent purchaser from a cotenant, or one having a lien upon his moiety, will not, we apprehend, ever be permitted to suffer from a claim against the cotenant of which he had no notice in fact and of the existence of which he could obtain no information by searching the public records: *Houston v. McCluney*, 8 W. Va. 135-151; *Burns v. Dreyfus*, 69 Miss. 211; 30 Am. St. Rep. 539; *Welch v. Ketchum*, 48 Minn. 241; *Stover v. Cory*, 53 Iowa, 708.

The cases in which one cotenant has been held to have a right of action against another, not founded upon any express or implied contract, and therefore not enforceable by personal judgment, are of two classes, in the first of which are those cases in which the cotenant having a right of action

has paid moneys for the purpose of removing some paramount lien or claim against the common property, and in the second of which are the cases in which he has made some justifiable expenditure on such property, in good faith and inuring to the advantage of all the co-owners. In the cases of the first class the lien may be recognized and enforced by the application of well-settled principles of equity without resorting to any rules peculiar to cotenancy. If a burden exists against the property of two or more persons, whether tenants in severalty or in common, which one of them discharges for the purpose of protecting his interest, he is in equity entitled for the purpose of indemnity to be subrogated to the lien or claim which he has discharged and to have it revived and enforced by declaring it to be still existing against the property and directing that the property, or so much thereof as may be necessary, be sold for the purpose of repaying the advancements. Hence a cotenant who discharges a mortgage, tax, or other valid lien against the common property is entitled either in a suit for partition or in some other appropriate proceeding to have the amount which he has paid beyond his just proportion ascertained and declared and held to remain a lien on the interest of his cotenant, and to a decree directing such interest to be sold in satisfaction of such lien: *Oliver v. Montgomery*, 42 Iowa, 36; *Moon v. Jennings*, 119 Ind. 130; 12 Am. St. Rep. 383; *Calkins v. Steinbach*, 66 Cal. 117; *Packard v. King*, 3 Col. 214; *Warfield v. Banks*, 11 Gill. & J. 98; *Titsworth v. Stout*, 49 Ill. 78; 95 Am. Dec. 577; *Wilton v. Tuzwell*, 86 Ill. 29; *Watson's Appeal*, 90 Pa. St. 426.

As a vendor of real property is regarded as having a lien for the unpaid purchase money, a tenant in common who pays more than his share of the purchase price may properly be considered as satisfying an outstanding encumbrance, and therefore entitled to a lien against the shares of his fellow-tenants for the amount equitably due from them on account of such purchase money, and may enforce such lien against them and all persons acquiring title from them and having actual or constructive notice of the lien, or of the facts necessary to its existence: *Dowdy v. Blake*, 50 Ark. 205; 7 Am. St. Rep. 88; *Rankin v. Black*, 1 Head, 650; *Gee v. Gee*, 2 Sneed, 395; *Newbold v. Smart*, 67 Ala. 326.

The only case coming within our observation which we are unable to reconcile with the rule that a cotenant discharging an encumbrance upon the common property is entitled to be subrogated to such encumbrance and in effect to have a lien for its reimbursement, is that of *Preston v. Wright*, 81 Me. 306; 10 Am. St. Rep. 257. It is difficult to determine, from a perusal of the opinion in this case, what principle the court intended either to affirm or to deny, but it is certain that the result of the case was to decide that a cotenant paying a sum assessed as taxes upon the common property prior to the sale of the land in payment of such taxes was not entitled to any lien against the interest of his cotenants. The court, however, seemed to regard the facts that the lien had by its payment become discharged and that, even had it never been discharged, the claim against the cotenants might have been enforced by pursuing them personally instead of selling the property as conclusive against the right of the cotenant either to reimbursement or to subrogation. If either of these facts can rightly be regarded as a cause for denying subrogation, it would apply equally to the removal of other encumbrances for, even in the case of a mortgage, or a vendor's lien, the payment of the whole thereof by one cotenant discharges it to the same extent as a tax is discharged by its payment, and in the one case as well as in the other it is always within the limits of possibility, though not of probability, that

the holder of the lien may choose to waive it and to proceed against the debtor personally and to thus relieve the common property from the peril of the lien.

It has been said "that a joint tenant or tenant in common has a lien for the price paid by him in the purchase of an adverse title. The title so purchased operates for the benefit of both tenants, and a cotenant should in equity be made liable for the due proportion of the price. The rule is the same whether the purchase be made before or after partition": Jones on Liens, sec. 1154; *Venable v. Beauchamp*, 3 Dana (Ky.) 321; 28 Am. Dec. 74. We think this is not an accurate statement of the law upon the subject. A cotenant cannot by the mere purchase of an adverse claim create any cause of action against his fellow-cotenants, nor, on the other hand, can he secure any advantage over them by such purchase, if they choose to claim its benefits and submit to its burdens: Freeman on Cotenancy and Partition, sec. 154; *Weaver v. Wible*, 25 Pa. St. 270; 64 Am. Dec. 696; *Gossom v. Donaldson*, 18 B. Mon. 230; 68 Am. Dec. 723. His purchase is not, however, void, nor does it vest in his cotenants by operation of law, any part of the title so purchased. If they wish to share in the purchase, they must, within a reasonable time after knowledge thereof, elect to bear their share of its burdens: Freeman on Cotenancy and Partition, sec. 156; *Lawrence v. Webster*, 44 Cal. 385; *Lee v. Fox*, 6 Dana, 177; *Brittin v. Handy*, 20 Ark. 403; 73 Am. Dec. 497; *Mandeville v. Solomon*, 39 Cal. 133. Therefore, instead of asserting that a cotenant purchasing an adverse claim has a lien for the amount paid in such purchase we think it less misleading to say, that he will not be required to surrender the advantage of his purchase until he has been repaid the amount of his necessary expenditures.

When the moneys paid by a cotenant in excess of his proportion have not been paid for the removal of a claim or lien which might have been asserted against the common property, had it not been paid, and to which it is therefore possible to subrogate him, there is much doubt whether he has any equity which may be recognized otherwise than by setting off to him on partition some part of the common property which has been benefited by his advancements without charging him with the increased value resulting therefrom. We shall not here enter upon a discussion of the question, whether a cotenant making permanent improvements or necessary repair upon the common property is entitled to be compensated therefor in the absence of any agreement, expressed or implied, to that effect. The authorities upon this subject are very conflicting: Freeman on Cotenancy and Partition, secs. 261, 262, 509-512. Whenever, however, the peculiar circumstances of the case, or the rules of law in the jurisdiction in which it is pending, imply the existence of any claim in favor of a tenant in common who has made repairs or improvements, then the court will enforce such claim against him either by making it a charge against his moiety of the property or deducing it from his share of the proceeds of a sale, or by refusing him any relief until he has done equity by paying the amount which is found to be equitably due from him: *Percy v. Millaudon*, 6 Mart., N. S., (La.) 616; 17 Am. Dec. 196; *Alexander v. Ellison*, 79 Ky. 148; *Taylor v. Baldwin*, 10 Barb. 626; *Swan v. Swan*, 8 Price 518; *Scott v. Nesbitt*, 14 Ves. 438-444; *Martindale v. Alexander*, 26 Ind. 104; 89 Am. Dec. 458; *Sarback v. Newell*, 30 Kan. 102; *Broyles v. Waddel*, 11 Heisk. 32; *Kurtz v. Hübner*, 55 Ill. 514; 8 Am. Rep. 665; *Carver v. Coffman*, 109 Ind. 547.

It is well settled that when partition is sought in equity or in a proceeding equitable in its nature and in the principles controlling it and determin-

ing the relief which might be awarded, each of the parties as a condition precedent to the relief to which he is otherwise entitled may be required to do equity, and therefore as an incident to the suit for partition, an accounting may be compelled and, at least, in those cases in which a sale of the property is decreed, the amount found to be due from any of the parties may be authorized to be deducted from his share of the proceeds of the sale. It may not be proper to say that the amounts so deducted are secured by liens, yet the practical effect of the proceeding is to make them liens upon the property because they are paid out of its proceeds. Therefore the subject of which we have been treating ought to be considered in connection with the power of the court in proceedings for partition to take an account between the parties and to appropriate moneys realized from their moieties to the satisfaction of certain demands. We therefore here insert what we have said upon this subject in treating of partition between cotenants.

"A complainant may, by the same bill, procure a partition and an accounting: *Obert v. Obert*, 10 N. J. Eq. 98; *Tuckfield v. Butler*, 1 Dickens, 241; *Wills v. Skade*, 6 Ves. 498; and the defendant may also, by a cross-bill, compel the complainant to account with him. Claims for rents received, or for use and occupation of the common property, to the exclusion of the other cotenants, are very frequently enforced in suits for partition: *Davidson v. Thompson*, 22 N. J. Eq. 84; *Goodenow v. Ewer*, 16 Cal. 472; 76 Am. Dec. 540; *Hill v. Fulbrook*, 1 Jac. 574; *Lorimer v. Lorimer*, 5 Madd. 363; *Story v. Johnson*, 2 Y. & C. Eq. Ex. 586, 594; *Humphrey v. Foster*, 13 Gratt. 657; *Allen v. Barkley*, Spear's Eq. 264; *Howey v. Goings*, 13 Ill. 107; 54 Am. Dec. 427; *Hawkins v. Taber*, 47 Ill. 460; *Pope v. Salesman*, 35 Mo. 365; *Rust v. Rust*, 17 W. Va. 901; *Scantlin v. Allison*, 32 Kan. 379; *Illinois L. & L. Co. v. Bonner*, 75 Ill. 315; *Bridgeford v. Barbour*, 80 Ky. 529. In New York, in an early case in which the point did not require to be decided, it was held that the 'rents and profits of the premises accruing while the land has been held adversely to the claim of the complainants, even if such rents and profits had been received by one who was a joint owner of the premises with the complainants, are not properly recoverable in this court upon a bill of partition; or rather, they must be more properly recoverable as mesne profits, in an ejectment suit brought for the recovery of the possession of the part claimed by the complainants': *Burhans v. Burhans*, 2 Barb. Ch. 410. The opinion here expressed has not, so far as we can ascertain, met with any support; and it certainly does not deserve to meet with any and is in conflict with subsequent decisions in the same state: *Scott v. Guernsey*, 60 Barb. 163; 48 N. Y. 106, 124. When equity has jurisdiction for partition, no obstacle exists to its proceeding to do complete justice, by compelling an account for all rents received; and nothing better than expense and delay can result from requiring one suit at law for mesne profits and another in equity for partition. 'Where one tenant in common has made a parol agreement with another tenant in common for his interest in the land, and paid a part of the purchase money, which agreement fails by reason of the purchaser's refusing to comply on account of the agreement not being in writing, a court of equity, in decreeing a partition, may properly decree the purchase money so paid to be a lien on the premises': *Campbell v. Campbell*, 11 N. J. Eq. 276. So where, on the joint purchase of the common lands, one of the cotenants had paid more than his proportion of the price, he was held to be entitled to be indemnified, for the excess, out of the proceeds of the sale in partition: *Warfield v. Banks*, 11 Gill & J. 98. A tenant in common who has removed an encumbrance from the common property is entitled to con-

tribution from his cotenants. To secure such contribution, a court of equity, acting in a suit for partition, in favor of the cotenant removing the encumbrance, will enforce an equitable lien of the same character with that which he has removed: *Titworth v. Stout*, 49 Ill. 78; 95 Am. Dec. 577. In one case, the commissioners awarded damages for waste. Their report was excepted to, on the ground that the remedy for waste was at law; but the court said: 'There is hardly any question in relation to property which this court may not determine incidentally, for the purpose of doing complete justice, and preventing multiplicity of litigation': *Backler v. Farros*, 2 Hill's Ch. (S. C.) 111. In decreeing partition of slaves the court required the plaintiff to reimburse the defendant for expenses incurred in a suit to recover the slaves from a third person: *McMeekin v. Brummet*, 2 Hill's Ch. (S. C.) 643. Claims for moneys expended in repairs may also be considered in a proceeding for partition in equity, and contribution may be decreed in a proper case: *McDearman v. McClure*, 81 Ark. 559": *Freeman on Cotenancy and Partition*, sec. 512.

NORTHERN CENTRAL RAILWAY CO. v. O'CONNER.

[76 MARYLAND, 207.]

RAILROADS—RIGHT TO MAKE AND ENFORCE RULES.—A railroad company has a right to make and enforce rules and regulations in regard to the admission of passengers to its trains, provided such rules are reasonable, and do not subject the passenger to unnecessary inconvenience and annoyance.

RAILROADS—RULE REQUIRING EXHIBITION OF TICKET.—A railroad company may, for its protection, enforce a rule requiring passengers to exhibit their tickets to a gateman in passing to a train, and the latter may, in the exercise of his judgment, refuse to allow one to pass through the gate on a defaced ticket, but the company is liable for the wrongful and injurious exercise of judgment by its gateman in this respect.

RAILROADS—RULE REGULATING EXHIBITION OF TICKETS.—When a rule made by a railroad company provided that the holders of defaced tickets may be refused admittance to trains, and referred to the ticket receiver for investigation, the holder of a ticket who in good faith presents it to the gateman in the same condition as when he got it, is not obliged to get the indorsement of the ticket receiver because its genuineness has been questioned by such gateman. This would not only subject the passenger to great inconvenience but in many cases would also make it impossible for him to get such indorsement in time to take the train, and if he is subjected to such inconvenience without fault on his part the company is liable in damages.

RAILROADS—RULE REGULATING EXHIBITION OF TICKETS—NEGLIGENCE OF PASSENGER.—When a railroad company's rule provides that the holders of defaced tickets may be refused admission to trains, and a passenger presents a ticket so defaced by his own act of negligence as to make its date illegible, the gateman or ticket receiver has a right to refuse to honor it, and refuse to allow him to pass to the train, and for such refusal no action will lie.

RAILROADS—RULE REQUIRING EXHIBITION OF TICKET—NEGLIGENCE OF COMPANY.—When a rule of a railroad company provides that the holder

of a defaced ticket may be refused admission to trains, and a passenger presents his ticket in the same condition as it was when he got it, though it is blurred and defaced without his fault, the refusal of the agent of the company to allow him to pass to the train will render the company liable in damages.

RAILROADS—MEASURE OF DAMAGES FOR REFUSAL TO HONOR TICKET.—The measure of damages against a railroad company for wrongfully refusing to honor a passenger's ticket is, in the absence of malice, wantonness, or circumstances of aggravation, such damages only as are the immediate and necessary consequences resulting from the wrongful act, such as expenses incurred by the passenger by reason of such wrongful refusal to allow him to enter the cars, the amount paid for another ticket, compensation for loss of time, hotel expenses, and inconvenience suffered, if it be such as is capable of being ascertained and assessed at a money value.

RAILROADS—REFUSAL TO HONOR TICKET—FACTS NOT JUSTIFYING EXEMPLARY DAMAGES.—When a railroad gateman wrongfully refuses to honor a passenger's ticket, or to allow him to pass to the train, on the ground that the ticket is defaced and looked as though its date had been rubbed out purposely, the fact that the gateman referred the passenger to the company's ticket receiver for his indorsement of the ticket, and that the gateman had time before the departure and without neglect of duty to have reported the case to the receiver himself, and failed and refused so to do, does not show such wanton or reckless indifference to the rights of the passenger as will justify a recovery of exemplary or punitive damages. If, in such case, the gateman used offensive or insulting language to the passenger, such conduct on his part would justify an award of exemplary damages.

ACTION to recover damages for a refusal on the part of an agent of a railroad company to honor the ticket presented by a passenger. The following instructions were given by the court upon the trial at the request of the plaintiff: "1. If the jury find that the defendant, on the twenty-seventh day of November, in the year 1889, operated a railway between Texas, in Baltimore county, and the city of Baltimore, and the plaintiff, on said date, bought at the station of defendant at Texas, an excursion ticket to said city, good for the round trip on the day of its issue, and used the first coupon thereof about midday of said date, and presented himself with the return coupon of said ticket on the evening of the day of its issue at the entrance gate to the train leaving Calvert station for Texas at half past eleven o'clock, and the ticket examiner at said gate looked at said coupon and refused to admit the defendant to said train, and that said coupon was not afterwards used by the plaintiff, then the plaintiff is entitled to recover in this action, unless they shall further find that said ticket was mutilated [or defaced while in possession of] the plaintiff so that the date of its issue could not be seen, and that the de-

defendant's agents could not otherwise [by the use of ordinary care and diligence] ascertain plaintiff's rights thereunder prior to the departure of said train; 2. If the jury find for the plaintiff under his first prayer [that is to say, if they shall find the return ticket offered in evidence was in substantially the same condition of legibility when it was shown to the gate examiner at Calvert station by the plaintiff as when it was received by the plaintiff from the defendant's agent at Texas and from the conductor on the down train], and further find the defendant's ticket examiner, in declining to accept said return coupon, gave as his reason for so doing that the date was rubbed out and it looked as if it had been done on purpose, and the plaintiff told said examiner the ticket had been bought that day, and he had ridden on the other coupon which the defendant then had, and he (the examiner) could compare them and see for himself, and the examiner thereupon referred plaintiff to defendant's ticket receiver, telling him said receiver's office was up those stairs, pointing to a stairway near by, and the plaintiff went up said stairs, but failed to find said office, and returned again to the gate where said examiner was and told the latter he could not find anyone upstairs, and again asked said examiner to admit him to the train or see about the ticket himself, but was refused, and that there was sufficient time after plaintiff presented the ticket at the gate and before the train started for the examiner to have reported the facts to the receiver, which he could then and there have done without neglecting his other duties at the gate, but which he failed and refused to do, these are facts from which, if found by the jury, they are at liberty to find that the refusal to accept said coupon and admit the plaintiff to said train was made, not merely in disregard of plaintiff's rights, but with a wanton or reckless indifference to such rights and in an aggravated manner; 3. If the jury find in favor of the plaintiff under his first prayer, then they should give him such damages as were the immediate and direct consequences naturally resulting from the wrongful refusal of the defendant's agents to permit him to take the train he applied for; 4. If the jury find for the plaintiff under both his first and second prayers, then they may allow him not merely such damages as they may find to have been the direct and immediate consequences of the defendant's refusal to admit him to the train he applied for, but also such other damages as under all the circumstances of the case

they may find will compensate him for the wanton or reckless indifference shown to his rights by the defendant's agents, and for the aggravated manner in which said refusal was made if the jury find such wanton and reckless indifference and aggravated refusal; 5. If the jury find for the plaintiff under his first prayer [that the return ticket offered in evidence was in substantially the same condition of legibility when it was shown by the plaintiff to the gatekeeper as when it was received by the plaintiff from the defendant's agent], and shall also find that defendant's agent, the gatekeeper, Chrystal, could, by the exercise of reasonable diligence, have ascertained plaintiff's right to be transported to his home at Texas on the train he sought to take, and that said gatekeeper refused or neglected so to inform himself, and said publicly, in the presence of the plaintiff and of all other persons who were then in and about the public railroad station in Baltimore, that the ticket the plaintiff presented to him was a scratched ticket or a rubbed ticket, and that in his opinion the rubbing had been done on purpose, that then the jury can allow the plaintiff not only the amount of his actual and necessary expenses incurred by reason of the refusal to allow him to take the train he desired, but, in addition thereto, such damages as the jury may believe he has suffered in his person and feelings by reason of such unlawful acts." The defendant excepted to the giving of these instructions, and after verdict and judgment for plaintiff for one thousand dollars damages, appealed.

Charles H. and Bernard Carter, for the appellant.

S. A. Williams and G. L. Van Bibber, for the appellee.

ROBINSON, J. This is an action to recover damages for the refusal by the defendant's agent to allow the plaintiff to pass through the gate to the train, then about to leave the Calvert station.

The plaintiff, a lime-burner by trade, bought of the defendant's agent a round-trip ticket from Texas station to Baltimore, good for two days, and paid therefor sixty-eight cents. The conductor on the train to Baltimore tore off the Baltimore coupon, and handed the return coupon back to the plaintiff. On the evening of the same day, the plaintiff exhibited the return coupon to the gateman, who, after examining it and finding the date thereon illegible, even by the aid of a strong electric light, told the plaintiff that the ticket was

in bad condition, and that he could not make out the date, and refused to allow him to pass through to the train. The plaintiff insisted that it was in the same condition as when he got it from the ticket agent at Texas station. This explanation, however, was not satisfactory, and, after some words between the plaintiff and the gateman, the ticket was handed to a police officer then on duty at the station, who, after examining it, said the "date was rubbed out, and it looked as if it had been rubbed out on purpose." The gateman then said "this is what I told him." The plaintiff still insisting upon his right to pass through, the gateman told him to take the ticket to the receiver's office upstairs, and his indorsement would make it all right. The plaintiff started up stairs, but how far he got there is some conflict in the testimony. Be that as it may, in a very short time he returned, and said he could not find the receiver's office, and demanded that he should be allowed to pass to the train, threatening at the same time to sue the company if the gateman refused. Thereupon the latter called the conductor of the train, and, showing him the ticket, asked if he would honor it, to which he replied "No." In a few minutes the train left, and the plaintiff was obliged to remain in Baltimore till the next morning.

The defendant offered in evidence the following rule adopted by the defendant company in regard to defaced tickets: "When outlawed or mutilated tickets, or tickets upon which the limit has expired, are presented at the gate, holders should be refused admittance to the trains, and referred to the ticket receiver for investigation of the case, who will decide the matter."

The defendant it is claimed has the right to pass rules and regulations in regard to the admission of passengers to its trains, and that if the return coupon was defaced, and the date thereon illegible when it was exhibited to the gateman, and the latter referred the plaintiff to the receiver for his indorsement of the ticket, and the plaintiff refused to take it to the receiver, then he is not entitled to recover in this action, even though the jury should find that the ticket was not in fact defaced or blurred by the act of the plaintiff, and was in the same condition as when he got it from the defendant's agent at Texas station. To this we cannot agree. The defendant has the right no doubt to pass rules and regulations in regard to the admission of passengers to its trains, pro-

vided such rules are reasonable rules, and do not subject the passenger to unnecessary inconvenience and annoyance. It may, for its protection, require passengers to exhibit their tickets to the gateman in passing to the train, and the latter may in the exercise of his judgment refuse to allow one to pass through the gate on a defaced ticket. But in this, as in other like matters, the defendant is responsible for the wrongful and injurious exercise of judgment on the part of its agents. The gate, as the record shows, is opened a few minutes only before the train is to leave the station. And how long it would take the receiver to examine and pass upon the validity of a ticket referred to him depends, as he testifies, upon the circumstances. He would be obliged to see whether he had the corresponding coupon, and this might involve the examination, he says, in some cases of a thousand tickets. And to hold that a passenger who has bought a ticket, and in good faith presents it to the gateman in the same condition as when he got it from the ticket agent, is obliged to go to the receiver's office and get his indorsement, because its genuineness has been questioned by the gateman, would not only subject him to great inconvenience but in many cases it would be impossible to get such indorsement in time to take the train. And besides, suppose the receiver refuses to indorse the ticket, it can hardly be contended that his judgment is binding and conclusive as against the passenger. At the same time we agree, that if the return coupon was so defaced by the act or negligence of the plaintiff as to make the date illegible, the gateman had the right to refuse to honor it, and to refuse to allow him to pass to the train, and for such refusal no action would lie.

On the other hand, if the ticket was so blurred or defaced at the time it was delivered to him by the ticket agent at Texas station, and it was presented at the gate in the same condition as when he got it, and the gateman refused to allow him to pass, the plaintiff being himself without fault, was under no obligation to get the indorsement of the ticket receiver, and for such wrongful refusal by the gateman the defendant is liable. So the defendant has no reason to complain of the plaintiff's first prayer nor of the rejection of its second prayer.

And this brings us to the question in regard to the measure of damages, and the law in this respect is well settled. In the absence of malice, or wantonness or circumstances of

aggravation, the plaintiff was entitled to recover such damages only as were the immediate and necessary consequences resulting from the wrongful act of the defendant; that is to say, the expenses incurred by him, by reason of the defendant's refusal to allow him to enter its car, the amount paid for another ticket, compensation for loss of time, hotel expenses, if any, incurred, and, in addition to these, inconvenience suffered by him, may be ground of damages if it is such as is capable of being ascertained and assessed at a money value: *Baltimore etc. R. R. Co. v. Carr*, 71 Md. 135. There was no error, therefore, in granting the plaintiff's third prayer. The rule laid down in defendant's second prayer, that in estimating the damages the jury should allow merely the sum of forty cents, being the cost of a ticket from Baltimore to Texas station, and the further sum of one dollar and fifty cents, being the actual loss sustained by the plaintiff by absence from his business, is rather too narrow, and the prayer was properly refused. We cannot agree, however, with the court below, that the facts set forth in plaintiff's second prayer would justify the jury in finding that the refusal by the gateman to accept the return coupon and to allow the plaintiff to pass to the train was made not merely in disregard of his rights but with a wanton or reckless indifference to such rights. Now what are these facts? First, that in refusing to accept the return coupon, the gateman assigned as a reason for so doing that the date looked as if it had been rubbed out on purpose, and then that he referred the plaintiff to the ticket receiver, and that he returned saying he could not find the receiver's office, and further that the gateman himself had time, before the departure of the train and without neglecting his other duties, to have reported the case to the receiver, and failed or refused so to do. We cannot agree that these facts in themselves would warrant the jury in finding that the gateman acted with a wanton or reckless indifference to the plaintiff's rights. He had no right, we agree, to use offensive or insulting language towards the plaintiff, and if he did, such conduct on his part would be evidence from which the jury would be justified in awarding exemplary or punitive damages. And we agree, too, that in saying the date looked as if it had been rubbed out on purpose, such language may be construed as an insinuation, at least, that the date had been rubbed out by the plaintiff. But the plaintiff, it is clear, did not so understand it, nor did he

consider it offensive, for it seems to have made no impression upon him. On the contrary, it had entirely escaped his recollection, and the evidence in regard to it was brought out by the gateman himself, who says that after examining the ticket the police officer told the plaintiff it looked as if the date had been rubbed out on purpose, which, the witness added, is "the same thing I told him." So it does not seem that the language was used, nor was it understood by the plaintiff as being used, in an offensive or insulting manner. Then, as to the refusal or neglect of the gateman to report the case to the receiver, the proof shows that it was his duty to stand at the gate until the departure of the train, and it would have been a breach of duty to have left the gate for this or any other like purpose. And there was error therefore in granting the plaintiff's second and fourth prayers.

Nor can we agree that these facts would warrant the jury in allowing not only such damages as they may find to have been the direct and immediate consequences of the defendant's refusal to admit the plaintiff to its train, but, in addition thereto, such other damages as they may believe he has suffered in his person and feelings. The case of *Philadelphia etc. R. R. Co. v. Rice*, 64 Md. 63, relied on in support of this instruction, differs widely from the case now before us. In *Rice's* case the plaintiff had purchased a round-trip ticket from Wilmington to Philadelphia, and on the trip to Philadelphia the conductor by mistake canceled the return coupon. Afterwards, finding out his mistake, he attempted to correct it, by writing on the return coupon, "canceled by mistake," and, handing it back to the plaintiff, said, "I have fixed it all right now, you can ride on it." The mistake, however, it seems, was not corrected in accordance with the rules of the company, and when the plaintiff presented the coupon to the conductor on the train from Philadelphia to Wilmington he refused to accept it, and demanded of the plaintiff that he should pay full fare on the return trip; this the plaintiff refused to do, and he was forcibly ejected from the car. He then brought an action of trespass *vi et armis* against the company, and, being wholly without fault, we said that if the servants of the company under such circumstances laid their hands forcibly on the person of the plaintiff, and compelled him to leave the car, there was not merely a breach of contract on the part of the company but an unlawful interference with the person of the plaintiff, and an indignity to his feelings, for which an action will lie, and for

which he is entitled to be compensated in damages. And this, too, even though the servants of the company acted without malice, and used such force only as was necessary. Such damages were not allowed as punitive damages, but as compensatory damages for the unlawful interference with the person of the plaintiff, and the indignity to which he was thus exposed in being forcibly ejected from the car. But the action in this case is for a breach of contract, and not an action of trespass *vi et armis*. It is not alleged, nor is there any proof to show, that the gateman used any force or violence, or interfered in any manner with the person of the plaintiff, and the rule laid down in *Philadelphia etc. R. R. Co. v. Rice*, 64 Md. 63, has no application to this case.

There being error in granting the plaintiff's second, fourth, and fifth prayers, the judgment must be reversed, and new trial awarded.

Judgment reversed, and new trial awarded.

RAILROAD COMPANIES.—EXHIBITION OF TICKETS, RULES REGARDING: See note to *Commonwealth v. Power*, 41 Am. Dec. 473-476; *Boston & Maine R. R. Co. v. Chipman*, 4 Am. St. Rep. 294. A rule requiring passengers to surrender their tickets to the conductor, when demanded, or exhibit them to him at all proper times, is reasonable and valid: *Illinois Cent. R. R. Co. v. Whittemore*, 43 Ill. 420; 92 Am. Dec. 138; *Pool v. Northern Pac. R. R. Co.*, 16 Or. 261; 8 Am. St. Rep. 289; not so a rule making a certain part of a ticket the only evidence of the passenger's right to travel on the train, and authorizing the conductor to disregard the passenger's explanation of the reason why he is not able to present the proper part—as where the wrong end of a round-trip ticket has been returned to the passenger by the mistake of the conductor himself: *Kansas City etc. R. R. Co. v. Riley*, 68 Miss. 765; 24 Am. St. Rep. 309.

EXEMPLARY DAMAGES, WHEN ALLOWABLE: See notes to *Austin v. Wilson*, 50 Am. Dec. 767, and *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 379-389. A railroad company is liable in damages for an assault committed by a conductor in ejecting from a train a passenger who holds a valid ticket, which the conductor refuses to recognize, and, in assessing the damages, the jury may take into account the annoyance, vexation and indignity suffered by the passenger: *Carsten v. Northern Pac. R. R. Co.*, 44 Minn. 454; 20 Am. St. Rep. 589. Vindictive damages may be recovered by a passenger who has, through the fault of a ticket agent, received a wrong ticket, and is ejected by the conductor for refusing to pay the additional fare: *Georgia R. R. etc. Co. v. Dougherty*, 86 Ga. 744; 22 Am. St. Rep. 492.

MARYLAND BRICK COMPANY v. SPILMAN.

[76 MARYLAND, 337.]

MECHANIC'S LIEN—MATERIALS FURNISHED UNDER ENTIRE CONTRACT.—

When materials have been furnished under a single and entire contract for a number of buildings erected on contiguous lots owned by the person to whom the material is furnished, a material-man's lien will attach to all of the buildings and lots, and, in an action to enforce such lien, it does not devolve upon the material-man to show how much of the material is placed in each building.

MECHANIC'S LIEN—ENTIRE CONTRACT TO FURNISH MATERIAL—EVIDENCE.

Under an entire and single contract to furnish material for the erection of a number of buildings on contiguous lots, it is not necessary to entitle the material-man to maintain his lien that he show that the material was actually used in the erection of the buildings provided he shows that such material was delivered to be used in their erection.

MECHANIC'S LIEN—ENTIRE CONTRACT—PART PERFORMANCE.—

Under an entire and single contract to furnish material for the erection of a number of houses on contiguous lots, the material-man is not entitled to a lien against all of the buildings and lots until he has furnished the material requisite to the construction of all the buildings. Under such contract a material-man's lien cannot be made available by part performance.

MECHANIC'S LIEN—WAIVER OF—BUILDING CONTRACT.—

A contract for furnishing the material necessary to erect a number of buildings, which provides that the material-man is to be given certain mortgages as collateral security for the payment of part of the material and a third party's guarantee for the payment of another part, contains nothing inconsistent with the existence of a material-man's lien on all of the buildings after the material has been furnished; nor does it constitute a waiver of such lien, and the payment of such guarantee and mortgages can have no other effect than to reduce the gross amount due for the material furnished.

MECHANIC'S LIEN—WAIVER OF—BUILDING CONTRACT.—

Parties to a building contract may contract as they think proper respecting the manner in which payment for materials may be made and they will not be considered as having waived the material-man's lien for the material furnished, unless they have expressly agreed to such terms as are inconsistent with the existence or enforcement of such lien.

MECHANIC'S LIEN—ENFORCEMENT OF—

Errors in account of the holder of a mechanic's lien will not affect his right to enforce it, such error may be corrected when the case reaches the auditor, whose duty it is to state a correct account.

N. P. Bond, Howard Munnikhuyzen, and Robert D. Morrison,
for the appellant.

Richard Bernard and Fielder C. Slingluff, for the appellees.

ROBERTS, J. The bill of complaint filed in this cause seeks the enforcement of a mechanic's lien for bricks used in the erection of certain houses in the city of Baltimore. The tes-

timony shows that some time in the month of October, 1883, Charles W. Rockafeller visited the office of the appellant, and stated that he and William J. Spilman were negotiating for the purchase from George R. Clark of certain lots of ground in Baltimore, for the purpose of building thereon forty-seven houses. The price to be charged for the bricks, and the quantity of bricks to be furnished, were there agreed upon. The appellant also agreed to accept said Clark's guarantee for five thousand dollars' worth of said bricks, and also to take three mortgages, each for the sum of one thousand dollars, as collateral security for the payment *pro tanto* for said bricks, and to give a reasonable time within which to pay the balance due thereon. In consequence of financial reasons, not disclosed, the lease was executed to Spilman instead of Rockafeller, and thereupon the appellant commenced and continued the delivery of the bricks to Spilman, until the completion of the building of said forty-seven houses. The bricks, from the beginning, in every instance save one—where a small quantity, less than thirteen dollars' worth—were furnished and charged to Spilman, who was the owner of the property whereon the buildings were in course of erection. On the 24th of September, 1884, there was due the appellant, for bricks furnished and delivered to the appellee, Spilman, to be used in the erection of said forty-seven houses, the sum of eight thousand six hundred and twenty-three dollars and ninety-three cents, to secure the payment of which the appellant laid its lien, and apportioned the same among the several houses to be affected by it. Subsequently the appellant was paid and satisfied the several sums of money due it under said lien on twenty-six of said buildings, and the same were released from the operation of said lien, so that there remained an unpaid balance on twenty-one of said buildings, which has not been released, and the contention on the part of the appellant is, that the said twenty-one buildings are subject to said lien, and liable to the payment of said balance. On the 14th of November, 1887, the appellant filed its bill of complaint to enforce the payment of the three thousand five hundred and ten dollars, with interest thereon from the 24th of September, 1884, which it claimed as the balance due for said bricks.

Spilman answered the bill of complaint, and admitted that the several conveyances of property were made and recorded as alleged in said bill, and that the lien claimed was

filed as therein stated, and further admitted that the appellant furnished certain materials, which were used in the erection and construction of said buildings, but denied that the sum claimed was due and owing, as alleged in the bill, and further stated that a large part of said lien was improperly charged against said improvements, said bricks being sold and charged to and upon the sole faith and credit of George R. Clark, who had no connection with said buildings as owner, builder or contractor, and that the various payments made on account of the appellant's claim have been improperly credited. Clark's answer is substantially the same with Spilman's. The only witness who testified before the examiner, and whose testimony appears in the record, is Mr. George M. Bokee, the president of the appellant. If any doubt could reasonably be entertained as to the nature and character of the contract for the sale and delivery of said bricks, it is entirely removed by the testimony, which shows conclusively that the intention of the parties was that the bricks were to be furnished continuously, and under one entire contract. Mr. Bokee, in his examination in chief, in answer to the twenty-first interrogatory, says: "When we agreed to sell the bricks to William J. Spilman, the lot of ground bounded north by Lanvale street, on the south by a road, since named 'Federal street,' on the west by Barclay street, and on the east by what is now called 'Carter alley,' was entirely vacant, and comprised one block of ground. (Pinkney Place was opened through the same afterwards running east and west, by Mr. George R. Clark.) The bricks were sold for the entire improvement, for the erection of forty-seven houses, and it is not unusual to construct four rows at the same time, by the same builder." Which being read in connection with Mr. Bokee's answer to the second and third interrogatories in chief, heretofore referred to in the statement of the testimony, ascertains with certainty the real contract existing between the parties for the sale and delivery of said bricks. The appellees have not sought to deny the terms of the contract, so far as the testimony shows, simply contenting themselves with the cross-examination of Mr. Bokee, who only emphasized that which he had previously stated in his examination in chief. The answer to the bill corroborates the fact that certain materials were furnished by the plaintiff in and about the erection and construction of the improvements upon the property mentioned in the bill. We come now to the construction of the law applicable to a contract of

this character, which we decide to be a contract to furnish continuously, under an entire contract, all the bricks necessary to the erection of the said forty-seven houses. The question is not a new one. It has been repeatedly considered by the courts of the other states, as well as by the United States supreme court, and there seems to be, so far as we have ascertained, almost entire uniformity in the conclusion which has been attained. In *Lyon v. Logan*, 68 Tex. 525; 2 Am. St. Rep. 514, Stayton, J., delivering the opinion of the court, says: "When materials have been furnished under a single contract, for buildings erected on two or more contiguous lots, owned by the person to whom the material is furnished, we see no reason why the lien should not attach to all the lots; and it would be exceedingly unreasonable to require the person who furnishes material in such a case to ascertain how much of the material is placed in each house. This is a matter under the control of the owner of the property improved, and if he does not see proper to make separate contracts for material to be used on each lot he cannot be heard to say that a lien does not attach upon all the lots upon which the material is used. This rule operates no hardship on the owner of the property, or persons who purchase from him with notice of the lien. If the former, owning contiguous lots, desires to affect them severally with a lien only for the material furnished for buildings or other improvements on each, he should so make his contract as to enable the material-man to know how much of his debt each lot is responsible for. So long as he treats such lots as one property, by making one contract for material to be used on all of them, without designating what part of the material is to be used on one lot or another, so long may the material-man treat the lots as one piece of property in fixing his lien upon it. A purchaser buys with his eyes open, and if he voluntarily purchases property which he knows is encumbered, he cannot complain if it is subjected, in his hands, to the payment of the debt for which its former owner has made it responsible."

The supreme court in *Phillips v. Gilbert*, 101 U. S. 725, Mr. Justice Bradley, speaking for the court, says: "We are satisfied, therefore, that when this suit was commenced the complainant's lien was good against the property for the amount found by the jury to be due to him, unless it was void for the reason stated in the demurrer of Boughton and Moore, namely, its being claimed on the whole row of build-

ings, and not on the buildings separately. We think, however, there is nothing in this objection. The contract was one, and related to the row as an entirety, and not to the particular buildings separately. The whole row was a building, within the meaning of the law, from having been united by the parties in one contract as one general piece of work." To like effect will be found the following cases: *Chadbourn v. Williams and Mechanic's Building and Loan Assn.*, 71 N. C. 448; *Marston v. Kenyon*, 44 Conn. 350; *Batchelder v. Rand*, 117 Mass. 176; *Paine v. Bonney*, 4 Smith, E. D., 750; *Moran v. Chase*, 52 N. Y. 346, *Carpenter v. Leonard*, 5 Minn. 155; *Orr v. Northwestern etc. Ins. Co.*, 86 Ill. 260; *Croskey v. Coryell*, 2 Whart. 223.

From the very nature of this contract it could in no event become important how many bricks went into one building, or whether more went into one than another. Nor was it requisite to entitle the appellant to maintain its lien that it should establish the fact that the bricks were actually used in the construction of the buildings or not, provided it was shown that under its contract with Spilman it had delivered the bricks to be used in the erection of said buildings: *Greenway v. Turner*, 4 Md. 296; *Treusch v. Shryock*, 55 Md. 833; *Watts v. Whittington*, 48 Md. 357.

It has been very earnestly contended by the appellees that the cases of *Wilson v. Wilson*, 51 Md. 159, and *Nickel v. Blanch*, 67 Md. 456, heretofore decided by this court, conclusively determined the law of this case. The facts, however, of each particular case must determine the propriety of the application of the principles of law which ought to govern in such case, and in neither of the cases just quoted are the facts the same or similar to those to be found in the record of this appeal. In *Wilson v. Wilson*, 51 Md. 159, the court's decision was that the proceedings to enforce the lien claim had not been taken in time, and such was the decision in *Nickel v. Blanch*, 67 Md. 456, based in each case upon the fact that there was abundant proof showing that the only materials furnished within six months prior to the laying of the liens in both cases were furnished for and used in houses in which the right to lien had been waived. Suppose any such burden was imposed upon the appellant in furnishing the bricks for the buildings in question, how could it have discharged the obligation? It only contracted to furnish and deliver the bricks for the forty-seven buildings and then its power to

fulfill the contract was at an end. It had no right to direct how the bricks should be used, and it could have no possible means of ascertaining or of showing into what building or buildings the bricks had gone, or whether they had been used at all in any of the buildings. It fulfilled its contract when it delivered the bricks. If such a burden under the contract rested anywhere it was with the appellee, Spilman, who had the means at his command of showing the exact truth in respect to the use to which the bricks had been put; but it was wholly immaterial to have required any such proof of the appellant, because the contract was a continuing undertaking to furnish and deliver materials for the erection of forty-seven houses, and the bricks were furnished for all of the forty-seven houses generally. Until the appellant had supplied the bricks requisite to the construction of said buildings, it would not have been entitled to and could not have claimed a lien, as the contract was entire, and could not be made available by part performance.

2. It is contended by the appellees that the appellant, in taking mortgage securities on certain of the forty-seven lots included in the lien, which have been since released of the mortgages and of the lien, and in accepting the guarantee of George R. Clark to pay for five thousand dollars' worth of bricks to be used in the erection of said buildings, are inconsistent with the right to the mechanics' lien. In view of the provisions of the law relating to mechanic's lien (Code, art. 63, sec. 3) we fail to see the force of the objection. The amount paid to Clark and the amount secured by the three mortgages could have, under the contract which we have been considering, no other effect than to reduce the gross amount due for the bricks furnished. It was of no consequence who paid for the bricks. If Spilman owned the property and contracted for the bricks it did not affect the law of the case that Clark paid for the bricks. The testimony abundantly shows that the terms of sale of the bricks were that Clark was to give his guarantee for the payment of five thousand dollars' worth of bricks, and that Spilman was to give the appellant, as collateral security for the payment of three thousand dollars of the purchase money, three mortgages, each for the sum of one thousand dollars, and the balance due for the whole amount of bricks to be used in the erection of the forty-seven buildings was to be paid within a reasonable time thereafter. There is nothing in the terms of

the contract inconsistent with the existence of the lien, nor is there anything in the contract which suggests an express or even an implied waiver of the lien. Parties may contract as they think proper respecting the manner in which payment for materials may be made, and they will not be considered as having waived their lien unless they shall have expressly agreed to such terms as are inconsistent with the existence or enforcement of the lien, in which event the lien is expressly waived by the legal effect of such contract. This is what the case of *Willison v. Douglas*, 66 Md. 99, and the case of *Pinning v. Skipper*, 71 Md. 347, have settled as law, and in each case this court had to deal with facts widely differing from each other, and in both cases wholly unlike the facts in this case.

3. Some discussion was had in the argument of counsel in this court concerning the manner in which the appellant had made up its bill of particulars, and of the method which it had adopted in keeping its account of the bricks sold and delivered to the appellee Spilman. A careful examination of both the bill of particulars and the account has failed to convince us that there is any substantial objection to either. Spilman himself, when the bills for bricks hauled were from time to time presented to him, made no objection, and when all the bricks had been delivered a bill for the whole amount of bricks furnished was rendered to him, without intimation of any error in the account. As to the application of the credit, the same having been paid on general account, there ought to be little difficulty since the decision of this court in *Trustees of German Lutheran Church etc. v. Heise*, 44 Md. 471, 472. If there should be found any errors in the account they can be corrected when the case reaches the auditor, whose duty it is to state a correct account. It follows from the views which we have expressed that the court below was in error in dismissing the bill; the decree must therefore be reversed, and the cause remanded.

Decree reversed, with costs, and the cause remanded.

MECHANIC'S LIEN—MATERIALS FURNISHED UNDER ENTIRE CONTRACT.—Mechanic's lien will attach to all the lots when materials have been furnished under a single contract for buildings erected on two or more contiguous lots owned by the person to whom the materials were furnished: *Lyon v. Logan*, 68 Tex. 521; 2 Am. St. Rep. 511. In such a case it is not necessary for the lien notice to name a particular building: *Wheeler v. Ralph*, 4 Wash. 617; but the lien may be enforced on a particular building and lot,

where it is shown that the account for the materials for such house was kept separate and distinct from the materials for the other houses: *Portones v. Badenoch*, 132 Ill. 377. Under the Massachusetts statute it was held in a recent case that a petition could not be maintained by a plumber who sought to enforce liens for labor performed on each of two houses which a builder with whom the plumber had contracted to furnish the labor and materials for an entire price, had erected for different proprietors under distinct contracts: *Cahill v. Capen*, 147 Mass. 493. As to the extent of the lien where the buildings are erected on the same lot, see *Wilcox v. Woodruff*, 61 Conn. 578; 29 Am. St. Rep. 222. In such a case, if the owner has never indicated, either orally or by anything done on the land, a purpose to divide the lot into smaller parcels, a builder who, under an entire contract, has erected several houses which cover only a portion of the lot, may enforce a lien upon the whole lot: *Quimby v. Durgin*, 148 Mass. 104.

WAIVER OF MECHANIC'S LIEN: See note to *Goble v. Gale*, 41 Am. Dec. 221. Lienors' acceptance of mortgage is a waiver of the lien: *Trullinger v. Kofoed*, 7 Or. 228; 33 Am. Rep. 708. Under the Mechanic's lien law of Maryland, if a stipulation in the contract, under which the builder is to furnish the materials, obligates the landowner to give a bond "as a bar against liens," and a bond is given conditioned for the faithful performance of his part of the contract, the builder will be deemed to have waived his lien: *Pinning v. Skipper*, 71 Md. 347.

ROANE v. HOLLINGSHEAD.

[76 MARYLAND, 362.]

WILL OF MARRIED WOMAN—REVOCATION BY MARRIAGE.—The marriage of a woman does not revoke a will made by her while a *feme sole* in a state where the statute provides that property acquired or owned by a married woman both before and after marriage "by purchase, gift, grant, devise, bequest, descent, or in course of distribution or in any other manner, she shall hold for her separate use, with power of devising the same as fully as if she were a *feme sole*." Such legislation removes every common law disability to which a *feme covert* was formerly subjected with respect to making a valid will.

MARRIED WOMAN'S WILL—REVOCATION AND POWER TO MAKE.—Statutes which clothe a married woman with full and absolute testamentary power over her own property, no matter how acquired, and give to her husband no authority to restrict her exercise of it, place her, so far as her capacity to make a will is concerned, upon the same footing as a *feme sole*. Under such legislation her common law disabilities are removed and her marriage does not revoke her will previously made, but she may revoke it at any time, and by another will dispose of her own property against the wishes of her husband, and even to his entire exclusion.

William A. Fisher, Paul M. Burnett, and William Reynolds,
for the appellant.

Richard R. Battee and William Pinkney Whyte, for the
appellees.

McSHERRY, J. On the 9th of December, 1889, Rachael Hollingshead, then being a *feme sole*, made and executed her last will and testament in due form of law, and on the 12th of August, 1891, she married Louis E. Roane. On May 18, 1892, she died. Her will was propounded for probate in the orphans' court of Baltimore city, and a caveat was thereupon filed by her surviving husband, wherein he claimed that the marriage had operated to revoke the will previously made. The single question involved, then, is, whether the marriage of a woman revokes a will made by her whilst she was single; and this is a question of first impression in Maryland.

At the common law, since the decision of Forse and Hembling's case in 1589, 4 Coke, 60, marriage revoked a woman's will previously made: *Hodsden v. Lloyd*, 2 Brown Ch. 534; *Doe, dem. Hodsden v. Staple*, 2 Term. Rep. 684; 2 Greenleaf on Evidence, sec. 684; 1 Jarman on Wills, c. 7. And this was so because marriage destroyed the ambulatory character of the will, and without that feature the paper ceased to be a will at all. The marriage destroyed the ambulatory character of the will, because by the marriage the wife was deprived of the power to devise her real estate, and was prevented from bequeathing her personal property, except by the consent of her husband given at the time of the execution, and continued until the probate of the will: 2 Jarman on Wills, 129. Her incapacity to make a will after marriage prevented her from altering or revoking one made before marriage, and it was this incapacity, and nothing else, that constituted the reason upon which the common law rule as to revocation by marriage was founded. This incapacity arose out of her husband's marital rights to control her property. When those rights did not exist or were excluded, as in the execution of a power of appointment, the incapacity ceased, and the wife could, notwithstanding her coverture, make a valid will: *Cutter v. Butler*, 25 N. H. 843; 57 Am. Dec. 330; *Miller v. Phillips*, 9 R. I. 143. It is obvious, therefore, that the rule does not and never did apply to a case where the reason of the rule was absent.

By sections 1 and 2 of article 45 of the code, as respectively amended by the acts of 1892, chapter 267, and 1890, chapter 394, it is provided that the property acquired or owned by a married woman, both before and after marriage, "by purchase, gift, grant, devise, bequest, descent, in a course of distribution, or in any other manner . . . she shall hold for her separate

use, with power of devising the same as fully as if she were a *feme sole*," etc. This legislation removed every common law disability to which a *feme covert* was formerly subjected, with respect to making a valid will. She was placed by it, so far as her capacity to make a will is concerned, upon exactly the same footing as a *feme sole*. She can revoke one already made, and she may by will dispose of her property against the wishes of her husband, and even to his entire exclusion. The statutes clothe her with full and absolute testamentary power over her own property, no matter how that property was acquired, and give to her husband no authority to restrict her exercise of it. If under these circumstances her marriage operates to revoke her will made before marriage, the revocation would be idle and utterly fruitless, because the moment afterwards she could confessedly make a new and valid will in identically the same terms as the revoked one. It was, as we have said, only because she could not after marriage execute a will, or a revocation of one previously made, that the common law annulled her will upon her marriage, and it would be exceedingly strange if, after the removal of her disability in this respect, the consequence of that disability should still continue. Upon principle, therefore, it would seem to be clear that when the statutes clothed her with unrestricted power to make a valid will, as fully as though she were a *feme sole*, they necessarily struck down, at the same time, the results which depended on her former incapacity to make a will at all. This conclusion is fully supported by many well-considered cases.

In Illinois the statute of wills of 1845 provides that married women shall have power "to dispose of their separate estate, both real and personal, by will or testament, in the same manner as other persons." By the act of 1861 entitled "An act to protect married women in their separate property," all the property of a married woman is made her separate property. "Such being the case," say the court *In re Tuller*, 79 Ill. 99, 22 Am. Rep. 164, "then, that under the statute of 1861, all of the property of a married woman is made her separate estate, we know no sufficient reason why, since the act of 1861, the statute of 1845 giving to married women the power to dispose of their separate estate by will should not have operative effect in respect to all of a married woman's property, and be construed as enabling her to dispose of all her property by will in the same manner as other persons.

The reason, then, for holding the will of a *feme sole* to be revoked by marriage would no longer exist, as the marriage would not destroy the ambulatory nature of the will, but still leave it subject to the wife's control."

In Wisconsin the laws of 1850, chapter 44, sections 1-3, and 1859, chapter 91, section 2, gave a married woman the absolute power to dispose of her property by will. "The rights and powers," say the court in *Will of Ward*, 70 Wis. 256, 5 Am. St. Rep. 174, "thus secured to married women by the statutes, remove every reason upon which the common law rule of revocation by such subsequent marriage was based, and hence such rule by implication is removed by the same statutes. The reason of the rule having ceased to exist, the rule itself also ceased."

By the revised statutes of New Hampshire, chapter 149, section 3, it was provided that a married woman when entitled to hold property in her own right and to her own separate use, might dispose of it by will as if she were sole and unmarried, and by subsequent acts of 1860 her testamentary capacity was extended so as to embrace all her estate, subject only to the husband's right of courtesy and distribution. In *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328, it was held that: "The incapacity of a married woman to make a will having been removed by these statutes, and she having become fully empowered to dispose of her own property in that way, no reason remains why her will made before marriage should by mere force of the marriage contract be revoked. If revoked, the testatrix could make another like it after marriage. The law does not operate to destroy and restore the same thing by the same breath. The testamentary incapacity of the married woman destroyed her premarital testament. The law having removed the incapacity, which operated as the destroying power, the will made before marriage remains unrevoked by that change in the testator's life. See also *Noyes v. Southworth*, 55 Mich. 173; 54 Am. Rep. 359; *Morton v. Onion*, 45 Vt. 145; *Emery, Appellant*, 81 Me. 275.

There was at one time considerable dispute in the English courts as to the true ground upon which marriage and the birth of issue affected the revocation of a will. In *Baldwin v. Spriggs*, 65 Md. 373, this court adopted the ground assigned by Lord Kenyon in *Doe, dem. Lancashire v. Lancashire*, 5 Term. Rep. 49, and subsequently followed by Lord Ellenborough in *Kenebel v. Scrafton*, 2 East, 534, and approved by

fourteen out of fifteen judges of England in *Marston v. Roe*, 8 Ad. & E. 14—namely, that marriage and the birth of issue effected a revocation because of the tacit condition annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family. It has been insisted, in the case at bar, that the rule that marriage alone revoked the will of a woman, stands or ought to stand on the same ground as that assigned by Lord Kenyon in the case of marriage and the birth of issue. But it is apparent at once that the two classes of cases are clearly distinguishable. It is not because marriage worked a total change in the testatrix's family that marriage revoked a woman's will—but it was, as we have already said, because she had, after marriage, no longer any testamentary capacity. Marriage alone never did revoke the will of a man, but marriage and the birth of issue did, because the will when made was made with the tacit condition that it would not take effect upon such a contingency coming to pass. The reasons upon which the two doctrines were founded are entirely distinct, and neither can be substituted for the other without confounding and confusing separate and independent principles.

The orphans' court of Baltimore city having reached the conclusion that the will in controversy was unrevoked, admitted it to probate, and as we concur in their action, we will affirm the order appealed from.

Order affirmed, with costs.

HUSBAND AND WIFE—POWER OF MARRIED WOMAN TO MAKE WILL.—This question is discussed in the notes to *Fellows v. Allen*, 49 Am. Rep. 329, and *Cutter v. Butler*, 57 Am. Dec. 340. A married woman can dispose by will of her separate property obtained by her by deed or devise: *Hickman v. Brown*, 88 Ky. 377. A married woman can dispose of her property by will in the same manner as if she were unmarried: *Estate of Teacle*, 132 Pa. St. 533.

WILL OF WOMAN—REVOCATION BY SUBSEQUENT MARRIAGE.—The marriage of a woman revokes a will previously executed by her in which such an event is not contemplated: *Ellis v. Darden*, 86 Ga. 368; *Smith v. Clemson*, 6 Houst. 171; *Matter of Kaufman*, 131 N. Y. 620; *Swan v. Hammond*, 138 Mass. 45; 52 Am. Rep. 255. The contrary doctrine is supported by the following line of authorities: *Emery's Appeal*, 81 Me. 275; *Fellows v. Allen*, 60 N. H. 439; 49 Am. Rep. 328, and note; *Noges v. Southworth*, 55 Mich. 173; 54 Am. Rep. 359, and note; *In re Tuller*, 79 Ill. 99; 22 Am. Rep. 164; *Will of Ward*, 70 Wis. 251; 5 Am. St. Rep. 174: See also the following notes discussing this subject: *Stewart v. Mulholland*, 21 Am. St. Rep. 329; *Young's Appeal*, 80 Am. Dec. 516, and *Cutter v. Butler*, 57 Am. Dec. 346. In the case of *In re Carey*, 49 Vt. 236; 24 Am. Rep. 133, the doctrine of the common law that the marriage of a *feme sole* revokes her will so far as it relates to personalty is asserted.

RILEY v. CARTER.

[76 MARYLAND, 581.]

ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHT OF SURVIVING PARTNER TO MAKE.—A surviving partner may lawfully make an assignment of the partnership property for the benefit of the firm's creditors, provided such assignment is just and equitable, made for the benefit of all of the creditors, and does not violate any of the provisions of the insolvency law of the state.

ASSIGNMENT FOR BENEFIT OF CREDITORS MADE BY LUNATIC is not void, but voidable merely.

ASSIGNMENT FOR BENEFIT OF CREDITORS BY LUNATIC—RIGHT OF CREDITORS TO SET ASIDE.—Creditors, unless prevented by statute, are entitled to have an assignment for the benefit of creditors set aside, on the ground that it invades their rights and was executed by their debtor while he was insane.

ASSIGNMENT FOR BENEFIT OF CREDITORS BY SURVIVING PARTNER of all partnership and individual property is to be considered as an assignment of partnership property for the benefit of partnership creditors, and of separate property for the benefit of separate creditors, and is valid.

ASSIGNMENT FOR BENEFIT OF CREDITORS EXECUTED IN DUPLICATE—EFFECT OF.—When two deeds of assignment for the benefit of creditors are executed in duplicate and are in all essential respects exactly the same they will be construed together as forming parts of a single conveyance and will convey to the trustees therein named the same interests and estate which they would have taken under one deed.

ASSIGNMENT FOR BENEFIT OF CREDITORS—FACT ADMITTED BY DEMURRER. An allegation in a complaint that an assignment for the benefit of creditors was made with intent to hinder, delay, and defraud creditors, and is therefore void, is legally sufficient and charges with certainty a fact which is admitted by demurrer.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN FRAUDULENT.—When the effect of a conveyance is upon its face to hinder and delay creditors, it will be construed as void against such creditors, without stopping to inquire what may have been the actual intention of the grantor.

ASSIGNMENT FOR BENEFIT OF CREDITORS BY SURVIVING PARTNER—EFFECT OF ON INDIVIDUAL AND FIRM PROPERTY.—A deed of assignment for the benefit of creditors made by a surviving partner to trustees of all his individual property and estate, and of all the property and estate belonging to the partnership, will convey to such trustees all of the surviving partners' individual estate and property, and all the property, assets, and estate of his firm, together with all real estate held in the firm name, including all which stands in the names of the individual partners, or either of them, which has been purchased with partnership funds, and equity will regard such real estate for the purposes of the partnership and between the partners and their creditors as personal estate for the payment of partnership debts and the adjustment and winding up of the partnership concerns, subject, however, in all respects, to the operation and effect of the provisions of the insolvent laws of the state.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONSTRUCTION OF INSOLVENCY LAW.—The Maryland system of involuntary insolvency is intended to

secure to the creditors of those who are insolvent, or in contemplation of insolvency, the right to select a permanent trustee to settle and wind up the insolvent estate, and when an insolvent, by any act of his, seeks to frustrate the design of the law, after he has committed an act of insolvency condemned thereby by executing an assignment for the benefit of creditors to a trustee of his own choosing, even though it is made without preference, and conveys all his property, any creditor or creditors holding claims against the insolvent debtor of the amount required by statute can, within four months after the commission of such act of insolvency, file a petition to have the insolvent debtor adjudicated an insolvent under the involuntary provisions of the law, also that the appointment of such trustee by the insolvent be set aside and that a permanent trustee be appointed.

Richard S. Culbreth, Samuel Snowden, and William J. O'Brien, Jr., for the appellants.

John Watson, Jr., and William A. Fisher, for the appellees.

ROBERTS, J. The demurrer to the bill of complaint in this case presents for the consideration of this court questions of more than ordinary interest and importance. The appellants, on the 22d of January, 1892, in their own right, and in behalf of all creditors becoming parties thereto, filed their bill in the circuit court of Baltimore city, for the purpose of setting aside two deeds, which were exact duplicates, and had been on the 14th of January, 1892, executed by Johns H. R. Nicholson, in his own right, and as surviving partner of the firm of J. J. Nicholson and Sons, to John M. Carter and Matthew K. Aiken, trustees, for the benefit of the firm creditors of J. J. Nicholson and Sons, and the individual creditors of Johns H. R. Nicholson. The deeds on their face profess to convey to the trustees all of the property and estate of Johns H. R. Nicholson, and also all the estate of the late firm of J. J. Nicholson and Sons. The bill seeks to have said deeds set aside as being void against creditors, and asks the appointment of a receiver to distribute the assets of said firm and of Johns H. R. Nicholson. The firm of J. J. Nicholson and Sons, composed of Johns H. R. Nicholson and Andrew J. Nicholson, bankers, doing business in Baltimore city, was dissolved on the 5th of January, 1892, by the death of the said Andrew J. Nicholson. The surviving partner took possession of the firm's assets, and continued the business. Shortly after the death of the said Andrew, the said John M. Carter and Rebecca T. Nicholson were, by the orphans' court of Baltimore city, granted letters of administration on his personal estate. Andrew, the deceased partner, resided in

Baltimore city, where one of said deeds was filed for record. Johns H. R., the surviving partner, resided in Baltimore county, where the other of said deeds was a few hours later filed for record. Since the execution of said deeds, and within twenty days thereafter, to wit, on the 24th of February, 1892, the said Johns H. R. Nicholson was, by the circuit court for Baltimore county, adjudicated an insolvent, under the involuntary provisions of the insolvent laws of Maryland, and Samuel D. Schmucker was elected by the creditors, and approved by the court, as his permanent trustee, and duly qualified as such trustee. The said trustees, Carter and Aiken, have taken possession of the property, estate, and assets of said firm, and the individual assets of the said Johns H. R. Nicholson, and are now engaged in the administration of the trusts sought to be created by said deeds, under the orders of the circuit court of Baltimore city, passed upon an *ex parte* petition filed by said trustees. There is exhibited with said petition a copy of the deeds of trust recorded in Baltimore city. Before we proceed with the consideration of the various questions which the record presents, we desire to state that although it may not be necessary that all of the questions before us on this appeal should receive judicial interpretation, yet many, if not all, of them are of importance to the commercial interests of the state, and have been argued with marked ability, exhibiting careful research, so that we deem it only just and proper to review and pass upon all the questions properly before us.

1. The first questions which suggest themselves to our consideration arise out of the execution of the two deeds which have been assailed. It is contended by the appellants that a surviving partner has no authority to execute such a deed, and that Johns H. R. Nicholson, the surviving partner in this cause, being *non compos mentis*, was legally incapacitated to execute and deliver the deeds in question.

The authority of a surviving partner to execute a deed for the benefit of creditors was at one time seriously controverted, and the decisions were by no means uniform; but the question has of recent years received the fullest consideration, and must now be regarded as practically determined in favor of the right of the surviving partner to assign, if in so doing he does not violate any of the provisions of the insolvent laws of the state of Maryland. It was a question in *Gable v. Williams*, 59 Md. 52, and this court, through its chief justice, said: "It may be

conceded that Gable, as surviving partner, could lawfully make a general assignment of partnership property to trustees for the payment of debts, provided such assignment be in all respects just and equitable, and made for the equal benefit of all the creditors interested in the deed. While such right in the surviving partner has not been in all cases approved, it would seem to be sanctioned by several well-considered cases of high authority: *White v. Union Ins. Co.*, 1 Nott. & McC. 556; 9 Am. Dec. 726; *Shanks v. Klein*, 104 U. S. 18; Burrill on Assignments, 3d ed., sec. 39. In some cases the right to make such general assignment would seem to be questioned, unless it appears that such assignment had been made with the assent of representatives of the deceased partner: *Hutchinson v. Smith*, 7 Paige, 35; *Egberts v. Wood*, 3 Paige, 520; 24 Am. Dec. 236; *Barcroft v. Snodgrass*, 1 Cold. 441." The following authorities directly sustain the views of this court: *Emerson v. Senter*, 118 U. S. 3; *Atchison v. Jones* (Ky., Sept. 11, 1886), 1 S. W. Rep. 406; *Williams v. Whedon*, 109 N. Y. 336; 4 Am. St. Rep. 460; *Patton v. Leftwich*, 86 Va. 421; 19 Am. St. Rep. 902; *Hanson v. Metcalf*, 46 Minn. 25; *Haynes v. Brooks*, 116 N. Y. 489; *Walling v. Burgess*, 122 Ind. 299; *Burnside v. Merrick*, 4 Met. 537.

2. In this case a serious question attaches to the right to assign, which involves the right of a lunatic to execute a deed. The pleadings in the cause concede that Johns H. R. Nicholson, at the time of the execution of the two deeds, was *non compos mentis*. It is contended on the part of the appellants that Owings' case, 1 Bland, 370, 17 Am. Dec. 311, and Corrie's case, 2 Bland, 490, have determined that the deed of a lunatic is not voidable, but absolutely void, and they cite *Dexter v. Hall*, 15 Wall. 9, as affirming the doctrine of those cases. But we cannot concur in this view, nor has this court ever so decided. The supreme court, in passing upon the questions under consideration in *Dexter v. Hall*, did not have before them the validity of a deed of conveyance, but of a power of attorney. Infants and lunatics stand very much upon the same plane, so far as courts of equity are concerned, and it has been universally held that the power of attorney of an infant is absolutely void, and so the supreme court, in *Dexter v. Hall*, 15 Wall. 9, held that the power of attorney of a lunatic was void, and rested their decision on the analogy existing between the rights of infants and those of lunatics, and says: "In fact, we know no case of authority in which

the letter of attorney of either an infant or a lunatic has been held merely voidable." This they could not have said respecting deeds of conveyance, as the reports of the state court contain numerous decisions affirming the view that the deed of a lunatic is not void, but only voidable. The firm of J. J. Nicholson and Sons had been for a long series of years engaged in the business of banking in the city of Baltimore; a member of the firm having died, a dissolution of the partnership was the consequence. Business complications soon followed, and, for the purpose of settling up the affairs of the firm, the surviving partner executed the deeds in question.

In this state it has never been doubted that a debtor in failing or embarrassed circumstances had the right to execute a deed of trust for the benefit of creditors when he dedicated all his property and estate to the payment of his debts. The question of a lunatic's authority, under certain circumstances, to execute a valid deed has, on more than one occasion, received judicial interpretation by this court. In *Evans v. Horan*, 52 Md. 610, this court, speaking through the late Justice Miller, said: "The exact question which the record presents is this: Is a deed of bargain and sale of real estate, made upon a valuable consideration, duly acknowledged and duly enrolled or recorded under our registry acts, void or merely voidable by reason of the fact that at the time it was executed the grantor was *non compos mentis*? Without advancing or at all sanctioning the broad doctrine that every act of a lunatic or infant is voidable, and not void, we are of opinion that the deed in question does not belong to that class which the law deems absolutely void. This, we think, has been established as the law of this state, whatever may be the conflict of authority elsewhere. We refer to the cases of *Key v. Davis*, 1 Md. 32, and *Chew v. Bank of Baltimore*, 14 Md. 299, and the reasoning and authorities cited and relied on by the court in those decisions. The cases of *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391, *Jackson v. Gumaer*, 2 Cow. 552, and *Breckinridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71, are directly in point. Many other more recent decisions of the state courts to the same effect might be cited, but it is unnecessary, inasmuch as we consider the decisions of our predecessors as having settled the law of Maryland upon this subject. A few brief quotations from the opinion in *Key v. Davis*, 1 Md. 32, will show the grounds upon which the doctrine is rested, and how cautiously it is guarded and

Johns H. R. Nicholson's, property and estate, real, personal and mixed, of whatever kind and wheresoever situate, as also the property, estate, and assets whatsoever of the said firm of J. J. Nicholson and Sons, in trust, for the purposes therein set forth. Can there be any reasonable doubt as to what those deeds convey? Under the decisions of this court, of numerous other state courts, and of the supreme court of the United States, it has been repeatedly held that: "The doctrine that real estate purchased with the partnership funds, for its use, and on its account, is to be regarded, in a court of equity, as the personal estate of the company, for all the purposes of the partnership, stands upon a familiar and just principle. It is the clear case of an implied or constructive trust, resulting from the relation which the partners bear to each other; and from the fact that the estate was brought into the firm, or purchased with the funds of the partnership, for the convenience and accommodation of the trade. For this reason, in whosoever name the legal title may reside, the estate is held, in the eye of a court of equity, for the use of the partners, as the *custis que trust*; and, if a partner dies, the legal estate of which he was seised as a tenant in common passes to his heirs or devisees, clothed with a similar trust, in favor of the surviving partners, until the purposes for which it was acquired have been accomplished": *Goodburn v. Stevens*, 5 Gill, 27. And again, this court in *Ebert v. Ebert*, 5 Md. 238, affirming *Goodburn v. Stevens*, says: "That real property purchased with partnership funds, and for partnership purposes, is to be regarded, upon the death of a partner, in a court of equity, as between the partners and their creditors, personal estate, for the payment of partnership debts, and the adjustment and winding up of the partnership concerns." This doctrine has been fully recognized in the case of *Shanks v. Klein*, 104 U. S. 18. Mr. Justice Miller, delivering the opinion of the court, says: "It is an equitable right accompanied by an equitable title. It is an interest in the property, which equity courts will recognize and support. What is that right? Not only that the court will, when necessary, see that the real estate so situated is appropriated to the satisfaction of the partnership debts, but that for that purpose, and to that extent, it shall be treated as personal property of the partnership, and like other personal property pass under the control of the surviving partner. This control extends to the right to sell it or so much of it as may be necessary to pay the

partnership debts, or to satisfy the just claims of the surviving partner. It is beyond question that such is the doctrine of the English court of chancery, as stated by counsel for appellant. As this result was reached in that court without the aid of any statute, it is authority of very great weight in the inquiry as to the true equity on the subject. We think, also, that the preponderance of authority in the American courts is on the same side of the question." The same view is maintained by Chief Justice Shaw, in *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697; also by *Delmonico v. Guillaume*, 2 Sand. Ch. 366; to the same effect are the English cases; *Ferrel v. Wightwick*, 1 Russ. & M. 45; *Phillips v. Phillips*, 1 Mylne & K. 649; *Cookson v. Cookson*, 8 Sim. 529.

In *Andrews v. Brown*, 21 Ala. 437, 56 Am. Dec. 252, the court says: "Inasmuch as the real estate is considered as personal for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying these debts, it must of necessity follow that he has the right in equity to dispose of the real estate for this purpose, for it would never do to charge him with the duty of paying the debts, and at the same time take from him the means of doing it. Therefore, although he cannot by his deed pass the legal title to the purchaser which descended to the heir of the deceased partner, yet, as the heir holds the title in trust to pay the debts, and the survivor is charged with this duty, his deed will convey this equity to his purchaser, and through it he may call on the heir for the legal title, and compel him to convey it." Confirming this view is the case of *Dupuy v. Leavenworth*, 17 Cal. 262, Chief Justice Fields, delivering the opinion of the court, says: "In the view of equity it is immaterial in whose name the legal title of the property stands—whether in the individual name of one copartner or in the joint names of all; it is first subject to the payment of the partnership debts, and is then to be distributed among the copartners according to their respective rights. The possessor of the legal title in such case holds the estate in trust for the purposes of the copartnership. Each partner has an equitable interest in the property until such purposes are accomplished. Upon the dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty of paying the debts, can dispose of this equitable interest, and the purchaser can compel the heirs at law of the deceased partner to perfect the purchase by con-

veyance of the legal "title." We further cite the following cases as fully sustaining the doctrine of this court: *Fairchild v. Fairchild*, 64 N. Y. 471; *Uhler v. Semple*, 20 N. J. Eq. 288; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305, approved and adopted in *Collumb v. Read*, 24 N. Y. 505; *Evans v. Gibson*, 29 Mo. 223; 77 Am. Dec. 565; *Fall River Whaling Co. v. Borden*, 10 Cush. 458. We may have gone to unnecessary length in presenting the views of the court upon the question, but we were induced to do so from the fact that there seemed to be some misapprehension of the doctrine determined in *Goodwin v. Stevens*, 5 Gill, 27, and *Ebert v. Ebert*, 5 Md. 338; and further, since the decisions of this court in the cases just quoted, the question has by other courts undergone careful consideration and conclusive determination, to which we have thought proper to refer as illustrating and sustaining the views of this court.

We think the surviving partner in this case has conveyed to the trustees named all of his individual estate and property, and all the property, estate, and assets of his firm, and that the conveyance covers all the real estate held in the firm's name situate either in Baltimore city or county, including also all that which stood in the names of the individual partners, or either of them, which had been purchased with partnership funds; and that a court of equity will regard such real estate, for the purposes of the partnership and between the partners and their creditors, as personal estate for the payment of partnership debts, and the adjustment and winding up of the partnership concerns, subject, however, in all respects to the operation and effect of the provisions of the insolvent laws of the state.

8. The deeds assailed in this cause were executed on the 14th of January, 1892; the bill to set them aside was filed on the 22d of the same month, and the said Johns H. R. Nicholson was on the 24th of February, 1892, adjudicated an involuntary insolvent. The permanent trustee, Samuel D. Schmucker, having been made a party defendant to this proceeding, has answered the same, in which he admits the adjudication of the said Johns H. R. Nicholson as an insolvent, and that he has duly qualified as his permanent trustee, and submits that the deeds of trust from Johns H. R. Nicholson to John M. Carter and Matthew K. Aiken which were made within four months prior to the adjudication in insolvency against the said Nicholson were made to trustees

of his own selection, who had no power to question any prior conveyances or preferences, and that said deeds are void within the purview of the insolvent laws of Maryland, and that the title to the property sought to be conveyed by said deeds is now vested in said permanent trustee; and further submits that if the circuit court of Baltimore city shall in the present case consider and pass upon the question of the validity of the said duplicate deeds of trust to Messrs. Carter and Aiken, then he is entitled to a decree therein declaring void said deeds, and that he is in any event entitled to a decree declaring that all the property and estate of every kind owned by the said Johns H. R. Nicholson on the 24th of February, 1892, when he was adjudicated an insolvent, including the property which by said deeds he attempted to convey to said Carter and Aiken, is now vested in him as permanent trustee, and that said decree should direct the said Carter and Aiken to transfer and deliver all such estate and property to said permanent trustee. Since the passage of the act of 1880, chapter 172, and of the acts amendatory thereto, this court has not been called upon to determine the general scope and policy of said laws as applied in the settlement of the estates of involuntary insolvents. It is very clear, however, that full operation and effect have not been given to the involuntary clauses which these acts have ingrafted upon our insolvent system, and only a partial application has been made of the important provisions which they contain. It is a reasonable inference to draw from the terms and conditions, which the legislature in the passage of these laws has employed, that it was the intention of the law-making power to recognize the rights and interests of those engaged in trade and commerce, and extend to them such protection as they were fairly and properly entitled to enjoy. The practice has long prevailed in this state, and, as already stated, has repeatedly received the sanction of this court, of employing deeds of assignment for the benefit of creditors as a means of adjusting and settling insolvent estates. The practice then tolerated was not in conflict with either the spirit or the letter of existing law. The National Bankrupt Act of 1867 had, however, been sufficiently long in operation to have made a very positive impression upon mercantile classes, to the effect that some of its provisions were most salutary, and notably its involuntary clause, which constituted a fair protection to the creditor without interfering with the just rights

of the honest debtor; and in obedience to this sentiment the legislature of 1880 borrowed from the bankrupt act some of its most useful features, and applied them to our insolvent system, which are now in force in this state. When the case of *Castleberg v. Wheeler*, 68 Md. 266, 280, was before this court, Mr. Chief Justice Alvey suggestively inquired: "Whether, after committing an act of insolvency, and within the four months preceding the institution of proceedings, any more than after an act of bankruptcy and within the time for taking proceedings, a debtor can make a valid general assignment for the benefit of creditors to a trustee of his own selection, who has no power to question any prior conveyances or preferences given, is a question we do not now deem it necessary to decide. Under the bankrupt law such general assignment could not be made to convey the property of the debtor, as against the assignee in bankruptcy: *Buchanan v. Smith*, 16 Wall. 277; *Mayer v. Hellman*, 91 U. S. 496; *Boese v. King*, 108 U. S. 379. But here the deed of assignment does not appear to have been assailed or called in question by any one; and as long as it stands it is effectual to transfer the assets to the trustee therein named; and the creditors, one and all, have a right to receive their just proportion of the fund according to the terms of the assignment: *Boese v. King*, 108 U. S. 379." In the case of *Whyte v. Betts Machine Co.*, 61 Md. 182, this court, through Mr. Justice Alvey, said: "These provisions of our insolvent law that relate to involuntary proceedings against the debtor are largely borrowed from the bankrupt act of the United States; and the construction and practice that prevailed while that law was in force are entitled to great consideration in solving questions that arise under our statute." Turning, then, to some of the decisions of the United States supreme court we find Mr. Justice Miller, delivering the opinion of the court in *Trimble v. Woodhead*, 102 U. S. 650, says: "The primary object of the bankrupt law is to secure the equal distribution of the property of the bankrupt, of every kind, among his creditors. This can only be done through the rights vested in the assignee, and by the faithful discharge of his duties": *Mayer v. Hellman*, 91 U. S. 496; *Toof v. Martin*, 13 Wall. 40; *Glenny v. Langdon*, 98 U. S. 20.

The importance which properly attaches to the right of the creditors of the insolvent to elect the permanent trustee, subject to the approval of the court, cannot well be overstated.

The record of this appeal furnishes illustration of the correctness of the views herein expressed as to the propriety of allowing to the creditors of an insolvent the privilege of selecting, under the supervision of the court, the person or persons in whom they have confidence, and who are recognized as possessing the requisite qualifications to discharge the important duties pertaining to the office of permanent trustee. The bill in this case alleges, as one of the grounds for setting aside the deeds as fraudulent, that the trustees were both disqualified, and assign reasons therefor, which have been, in the argument in this court, very earnestly pressed upon our consideration. This court in *Waters v. Dashiell*, 1 Md. 471, through Mr. Justice Tuck, speaking with reference to a fraudulent deed says: "The trustee does not claim as an ordinary purchaser from the insolvent would. In such a case the grantee takes nothing. But here, he cannot be considered as voluntarily conveying the property. In fact, it is no part of his design to pass the title to the trustee for the benefit of the creditors, whom he has attempted to defraud by the previous assignment. But the trustee takes the property against the will of the grantor. The fraudulent intent is thus frustrated. . . . The trustee becomes the mere officer of the law, designated not by the insolvent, but by the court, to effect what the law designs, and nothing more. . . . It is conceded in argument, that if this were the case of an assignee claiming under the bankrupt laws, the title of the appellant would be good. Looking to the frame and design of our insolvent system, we cannot perceive that there is any material difference between it and the proceedings in bankruptcy, as far as the title to property so situated is concerned. . . . The design of these laws was to secure the property, so conveyed, to the use of creditors. Our insolvent system provides a person, whose duty it is to represent creditors, and to assert their claim to property fraudulently conveyed away by the petitioner." Chief Justice Redfield, speaking for the court in *Mussey v. Noyes*, 26 Vt. 471, says: "Assignments made directly to the creditors, so as to require them to name the trustee, and thus make him their man, instead of his being, as is too often the case, the mere creature of the assignor, are certainly entitled to the most favorable consideration of the courts." And such, we think, is the policy which the legislature has adopted and applied to our present insolvent system. So far back as the decision of this court in *Alexander*

v. *Ghiselin*, 5 Gill, 178, Judge Chambers, speaking of the laws then in force, said: "The leading and general design of all bankrupt and insolvent laws is to insure a prompt and complete settlement of all the affairs of the party, and an early distribution amongst the creditors, as nearly in equal proportions as a regard to positive and acknowledged preferences will admit. To facilitate these objects, one law has wisely given to the trustee, to be appointed by the court, the entire management of the estate, subject, of course, to the control of the court by whom he is appointed, charging him with the duty of paying off liens and encumbrances to which the estate might be subject. His duty requires him to make the earliest disposition and settlement regarding the interests of all the creditors, the particular lien creditor included, and brings all the claimants before one tribunal, whereas, by allowing sheriffs and mortgagees to participate in the administration of the trust, adverse interests are created, delays endangered, if not insured, and probably different and possibly conflicting tribunals consulted." See also *Pinckney v. Lanhlan*, 62 Md. 447. There is no system of laws more thoroughly remedial than the provisions of the insolvent laws, and especially those which relate to involuntary insolvency. They guarantee justice and equality to each and every creditor according to his legal rights. They prevent all possible conflict of jurisdiction, obviate all confusion, and provide an entire administration of the insolvent estate in one court. If further authority were needed to sustain the views which we have expressed concerning the duties and powers of the permanent trustee in involuntary insolvency, it is only necessary to refer to the able and exhaustive opinion of Mr. Justice Clifford in *Glenny v. Langdon*, 98 U. S. 20, where he treats of the jurisdiction of courts of bankruptcy and the powers of assignees. But the conventional trustee is not clothed with the powers requisite to enable him efficiently to discharge the duties which devolve upon him; he is limited in his authority to act, and naturally prejudiced in favor of the assignor, because of the preference shown him in his selection as assignee. The theory upon which the assignor is permitted to select the assignee is without support under our insolvent law, and can no longer be sanctioned, if full effect is to be given to the involuntary provisions of the law. The record does not show with sufficient certainty the facts upon which the circuit court for Baltimore county adjudicated *Johns H. R.*

Nicholson an insolvent, but the answer of Mr. Schmucker, the permanent trustee, supplies sufficient data for the purposes of this opinion. For illustration, suppose this state of case to exist: That said J. J. Nicholson and Sons, being bankers and doing business in the city of Baltimore, and being insolvent, or in contemplation of insolvency, did, on the 14th of January, 1892, suspend payment of their negotiable paper, and failed to resume payment thereof for more than twenty days thereafter, and on the 9th of February, 1892, and within four months after the commission of the act of insolvency complained of, certain creditors filed their petitions in the proper court to have them declared involuntary insolvents; and further that said J. J. Nicholson and Sons were, on the 24th of February, 1892, adjudicated insolvent under the involuntary provisions of the law, in pursuance of said petition. Having committed an act of insolvency in failing to resume payment of their negotiable paper, within twenty days after they had suspended payment, to wit, on the 14th of January, 1892, and the petition to adjudicate them insolvent having been filed on the 9th of February, 1892, could J. J. Nicholson and Sons, by any act of theirs, suspend the operation or annul the effect of the provisions of the insolvent laws?

A case somewhat analogous to the facts just stated is *In re Laner*, 9 Nat. Bank. Reg., 494, where an application for an adjudication of bankruptcy was made against the debtor, and the acts of bankruptcy alleged were that the debtor being a merchant, had suspended payment of his commercial paper, and had not resumed within a period of fourteen days; and it appears that before the expiration of the fourteen days the debtor had made an assignment for the benefit of creditors, under the Ohio statute, it was held, that the assignment did not prevent the running of the fourteen days, and also held that the fact, that the state court had acquired jurisdiction of the debtor's estate, did not prevent the bankrupt court from proceeding under the bankrupt law, notwithstanding no fraud was shown in the assignment. For us to adopt a different view is to declare that our involuntary insolvent laws are practically a nullity, and that they are wholly inadequate to accomplish the object which the legislature had in view in their enactment. We however entertain no doubt as to their practical utility, and legal sufficiency, and believe that, when circumstances justify their application, they will be found to

be both salutary and effective in the solution of the complications and irregularities which so often attend upon and frequently follow in the wake of insolvency. One of the most important attributes of the power of the permanent trustee in involuntary insolvency is that he is not limited to the assets and estate of which the insolvent was seised and possessed at the date of his adjudication as an insolvent, but his title relates back to the commencement of the proceedings in insolvency, and takes effect from the date of the filing of the petition. Such, also, was the construction placed upon the powers of assignees under the bankrupt act: *Glenny v. Langdon*, 98 U. S. 20; *Conner v. Long*, 104 U. S., 228. We are of opinion that the legislature, in the passage of acts creating a system of involuntary insolvency, intended thereby to secure to the creditors of those who were insolvent, or in contemplation of insolvency, the right to select the permanent trustee, to settle and wind up the insolvent estate; and when the insolvent, by any act of his, seeks to frustrate the design of the law, after he has committed an act of insolvency condemned by the law, by executing an assignment for the benefit of creditors, even though it be made without preference, and convey all his property, nevertheless any creditor or creditors holding claims against the insolvent debtor of the amount required by the statute can, within four months after the commission of an act of insolvency, file a petition to have the insolvent debtor adjudicated an insolvent under the involuntary provisions of the law. This, we think, is clearly the right of the creditor; but we must not be understood as deciding that the permanent trustee, after he has qualified as such, can delay the commencement of proceedings to set aside the assignment, until the conventional trustee has been permitted to proceed so far with the settlement of his trust estate, as to indicate that the permanent trustee is not only negligent of his rights and duties, but careless in their performance, and that he does not propose to take action in the premises. It would, however, be impossible to prescribe any positive rule, as to whether the application to set aside is made within a reasonable time or not, but this question can be safely left to the determination of the courts having jurisdiction of the subject matter. The circuit court, in the further consideration of this cause, will have before it all the parties necessary to a proper determination of the respective rights involved, and having jurisdiction of the subject matter,

it can proceed according to the usual order of the court: *Haugh v. Maulsby*, 68 Md., 426. It follows from the views expressed that the decree should neither be affirmed nor reversed, but the cause must be remanded for further proceedings under article 5, section 36, of the code, as relief may be given and decree passed between codefendants; and, as the permanent trustee under the insolvent proceeding sets up and makes claim by his answer of all the property embraced by the deeds, the court may proceed to decree as the law requires.

Cause remanded for further proceedings under article 5, section 36, of the code.

PARTNERSHIP—RIGHT OF SURVIVING PARTNER TO MAKE ASSIGNMENT FOR BENEFIT OF CREDITORS.—Surviving partners may make an assignment of the firm property for the benefit of its creditors, to the same extent that all the partners could were all living: *Patton v. Leftwich*, 86 Va. 421; 19 Am. St. Rep. 902, and note; *Shattuck v. Chandler*, 40 Kan. 516; 10 Am. St. Rep. 227, and note; *Williams v. Whedon*, 100 N. Y. 333; 4 Am. St. Rep. 400, and note; note to *Shields v. Fuller*, 65 Am. Dec. 302.

INSANE PERSONS—VALIDITY OF DEEDS OF.—A deed of a lunatic not under guardianship is not void: *Odum v. Reddick*, 104 N. C. 515; 17 Am. St. Rep. 686, and note, such a deed is voidable only, not void: *Pearson v. Coz*, 71 Tex. 246; 10 Am. St. Rep. 740; and note with cases collected. See also, for a further discussion of this doctrine, the notes to *Allis v. Billings*, 39 Am. Dec. 740, and *Jackson v. King*, 15 Am. Dec. 364. To render the deed of an insane person not merely voidable, but absolutely void, it must appear that the grantor was, at the time he executed it, absolutely and completely unable to understand the nature of the transaction: *Aldrich v. Bailey*, 132 N. Y. 88.

ASSIGNMENT FOR BENEFIT OF CREDITORS—HINDERING AND DELAYING CREDITORS.—An intent to hinder and delay creditors by an assignment for the benefit of creditors renders it fraudulent and void: *Nicholson v. Leavitt*, 6 N. Y. 610; 57 Am. Dec. 499; *Arthur v. Commercial etc. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; *Hess v. Hess*, 117 N. Y. 306; *Burt v. McKinstry*, 4 Minn. 204; 77 Am. Dec. 507; *Knight v. Packard*, 1 Bean Oh. 214; 72 Am. Dec. 388, and note; *Savage v. Knight*, 92 N. C. 493; 53 Am. Rep. 423. Unless the intent to hinder and delay creditors is clearly visible in an assignment for the benefit of creditors it should not be held void: *McCallie v. Walton*, 37 Ga. 611; 95 Am. Dec. 309, and note. An assignment will be valid notwithstanding the debtor contemplated the hinderance and delay of creditors, if the purpose of the deed is to pay honest debts: *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806, and note; or where such delay or hinderance follows only as an incident to the assignment: *Hazell v. Bank*, 95 Mo. 60; 5 Am. St. Rep. 22, and note.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

FORD v. EASTHAMPTON RUBBER THREAD CO.

[188 MASSACHUSETTS, 84.]

CORPORATIONS, DIVIDENDS, RIGHT OF ACTION FOR.—When a dividend has been declared and become payable according to the terms of the vote declaring it each stockholder has the right to demand payment of the proportional part which belongs to his share of stock, and to sue the corporation for it if it does not pay on demand.

CORPORATIONS—CONSIDERATION FOR THE PROMISE OF A CORPORATION TO PAY A DIVIDEND IS NOT REQUIRED.—The cause of action in favor of each stockholder and against the corporation does not arise from any actual contract between the corporation and its stockholders, but from the nature of the organization and the relation of the stockholders to the corporation and its property.

CORPORATIONS—DIVIDENDS, RIGHT TO RESCIND VOTE THEREFOR.—If a dividend has been declared by a vote of the directors, payable at a future time, the vote declaring it may be rescinded at a subsequent meeting of the directors, held before the dividend becomes payable, and before the fact that it has been declared has been made public, or communicated to the stockholders, or any fund set aside for its payment.

ACTION for money had and received by which the plaintiff sought to recover the amount of a twenty per cent dividend declared by the defendant on June 16, 1891, on fifty-two shares of stock held by the plaintiff. The dividend was, by the terms of the vote declaring it, payable on June 28d of the same year. On the day the dividend was declared the annual meeting of the stockholders was held, and a new board of directors elected. This board assembled on the same day, and rescinded the vote of the twenty per cent dividend, and in place thereof declared a dividend of six per cent only. The corporation had abundant means of paying the twenty per cent dividend, but it did not set aside any

fund for that purpose. Its treasurer tendered plaintiff the amount of the six per cent dividend, which he refused to accept, and thereupon brought this action. The trial court decided that the directors had power to rescind the first dividend, and therefore that plaintiff could not recover.

G. M. Stearns, for the plaintiff.

W. G. Bassett, for the defendant.

FIELD, C. J. It seems to be settled that when a dividend has been fully declared the corporation thereby manifests its intention that the amount of the dividend should be considered as having been separated from the other property of the corporation, and as having become the individual property of the stockholders, and that therefore when the dividend becomes payable according to the terms of the vote declaring it each stockholder has a right to demand payment of the proportional part of the dividend which belongs to his shares of stock, and to sue the corporation for it, if it is not paid on demand. In some cases money or other property equal to the whole amount of the dividend declared has been specifically set apart as a fund appropriated to the payment of the dividend, and the stockholders have been regarded as the *cestuis que trust* of this fund, each entitled to his share. In other cases the corporation has credited the stockholders with the amount of their shares of the dividend, and the stockholders have assented to this, and the amount so credited has been regarded as a debt of the corporation to the stockholders, or the corporation has paid to some of the stockholders their shares of the dividend, and has refused to pay anything to the others, and it has been held that the corporation must pay all alike: See *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *State v. Baltimore etc. R. R. Co.*, 6 Gill, 363; *King v. Paterson etc. R. R. Co.*, 29 N. J. L. 504; *Jermain v. Lake Shore etc. Ry. Co.*, 91 N. Y. 483; *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771; *Jackson v. Newark Plankroad Co.*, 31 N. J. L. 277; *Wheeler v. Northwestern Sleigh Co.* 39 Fed. Rep. 347. When a dividend has been declared payable at a definite future time, but no fund has been set apart for the payment of the dividend, and the corporation meanwhile becomes insolvent, whether the stockholders to the extent of their proportions of the dividend should share ratably with the creditors of the corporation in its property has not, so far as we know, been recently considered, but the decision in

Lowene v. American Ins. Co., 6 Paige, 482, is that they should. The setting apart of a fund to pay a dividend has been held to give a lien upon it to the stockholders, which they can enforce to the exclusion of the general creditors of the corporation: *In re La Blanca*, 14 Hun, 8, and 75 N. Y. 598; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657. The English companies' act, 1862 (25 & 26 Vict., c. 89, sec. 38, cl. 7), provides that "no sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves." Upon these questions, however, we desire to express no opinion.

It has been argued that there is no consideration for the promise of a corporation to pay a dividend to its stockholders, but we think that the doctrine of consideration applicable to a simple contract between persons having no fiduciary relations to each other is not applicable to such promise. It is the object of a private business corporation to make money for its stockholders, and, under our laws, it is ordinarily the duty of the directors from time to time to declare dividends out of the net earnings, if there are any, and it must be left largely to the discretion of the directors to determine when and for how much such dividends should be declared. The whole property of the corporation is held on a sort of trust for the stockholders, and the directors are, in a general sense, the managers; and when a dividend is declared by the directors, the declaration is a determination by a body authorized to make it that the amount of the dividend should be taken from the property of the corporation and paid over to the stockholders. The cause of action of each stockholder against the corporation for nonpayment of the dividend does not arise from any actual contract between the corporation and its stockholders, but from the nature of the organization, and the relation of the stockholders to the corporation and its property. Unless the rights of creditors intervene, or the corporation is enjoined from paying the dividend, on the ground that the dividend has not been earned, or on some other ground, the amount of the dividend after it has been declared and has become payable is considered as property

held by the corporation for the use of the stockholders individually, and the stockholders may recover their shares as money or property had and received to their use. We have been able to find little or no authority on the precise question involved in this case, namely, whether, after a dividend has been duly declared by a vote of the directors, but payable at a future time, the vote can be rescinded at a subsequent meeting of the directors, held before the time at which the dividend becomes payable according to the vote, when the fact that a dividend has been declared has not been made public, or in any manner communicated to the stockholders, and when no fund has been set apart for the payment of the dividend. On principle, we do not see why the directors may not rescind such a vote, under the circumstances stated. By the vote no specific property passed to the stockholders. If the vote be regarded as a declaration of trust in favor of the stockholders, it could be revoked before it was communicated to them or any property was identified and set aside for them. Indeed, cases may easily be supposed of such a change in the affairs of a corporation, between the time when a dividend is declared and the time when it becomes payable, as to make the exercise of such a power by the directors useful, if not necessary, for the successful continuance of the business of the corporation. It appears in the present case that the meeting of the new directors at which the vote was rescinded was held after the annual meeting of the stockholders, but on the same day as the meeting of the directors at which the vote was passed, which was held just before the meeting of the stockholders; and that at the meeting of the stockholders "the president did not, as had for many years been the custom, announce that any dividend had been declared, or promulgate the same to the stockholders"; and it does not appear that any of the stockholders, except the directors, knew of the original vote, or that any of the stockholders had made any contracts, incurred any liability, or done anything relying on the vote. It also appears that no fund was distinctly set apart for the payment of the dividend before the vote was rescinded. As the passage of the vote did not constitute an actual contract of the corporation with its stockholders, but was merely a mode of dividing the earnings of the property of the corporation among the stockholders, we are of opinion that before the division had been actually made, and before the position of the stockholders had been changed in reliance on

the vote—certainly before the passage of the vote had been made public, or communicated to the stockholders—it was within the power of the directors, at a meeting subsequent to that at which the vote was passed, to rescind it. In this action at law we cannot supervise the exercise of this power by the directors.

Judgment for the defendant.

CORPORATIONS—RIGHT TO DIVIDENDS.—Dividends belong to the owner of the stock at the time they are declared, although they are made payable at a future date: *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771. Dividends declared on stock in corporations are payable on demand: *Armant v. New Orleans etc. R. R. Co.*, 41 La. Ann. 1020. See extended note to *Goodwin v. Hardy*, 99 Am. Dec. 763.

ROBERTSON v. ROWELL.

[158 MASSACHUSETTS, 94.]

A MARRIED WOMAN AND HER SEPARATE ESTATE ARE BOUND BY HER INDORSEMENT on a promissory note to a third person when such note purports to be payable to her order, though it was given for a pre-existing debt of her husband, if it was made pursuant to an agreement between the indorsee and the husband that if the note should be paid it should be in settlement of all claims between the parties. The implied promise not to sue on the note against the husband until the maturity of the note, nor afterwards, if it should be paid when due, is a valuable consideration, sufficient to support the promise of the wife implied from her indorsement.

NEGOTIABLE INSTRUMENTS—CONSIDERATION—KNOWLEDGE OF THE CONSIDERATION by one indorsing a promissory note for the accommodation of another is not necessary except when the note has been issued and become operative before such indorsement, and the indorsement must therefore be regarded as a new contract.

BILL in equity to hold a married woman upon three promissory notes signed by her husband, payable to her order, and which she had indorsed to plaintiff.

E. I. Smith and C. M. Ludden, for the plaintiffs.

W. H. Powers and N. Currier, for the defendants.

KNOWLTON, J. The only question reserved by this report is whether the bill should be dismissed on the ground that the notes, as against the defendant, Elizabeth B. Rowell, were without consideration. A written agreement was made between the plaintiff Robertson and William B. Rowell, the husband of the female defendant, referring to the notes set

out in the bill, and providing that if paid to the said Robertson they should be a settlement in full of all claims between the parties up to that date; but if any of them should not be paid, the account should stand as stated in the ledger of Robertson. The notes were signed by William B. Rowell, and made payable to the order of Elizabeth B. Rowell, and on the back of each were written the words: "I hereby charge my separate estate with the amount of this note." The agreement and all the notes were signed by William B. Rowell, and were left with Robertson. A week or two afterwards Mr. Rowell brought his wife into the city, and she went with him to the office of Robertson and put her name on the back of each of the notes under the words written there. Robertson was away, but had left the papers with his book-keeper.

It is evident from the form of the notes and from the written agreement that they were left incomplete, and were not designed to be held as contracts until signed by Mrs. Rowell. They were payable to her order, and were to be indorsed by her before they would be in a condition to be used by Robertson. We do not understand the court to find that the papers were delivered as binding contracts when they were left with Robertson, but merely left with him to be held for completion by the signature of Mrs. Rowell, and for future delivery. It is apparent that the transaction was inchoate until the notes were signed by her and the papers subsequently delivered to take effect as contracts. It is also manifest that she intended to lend her credit to her husband. It is found that it was a part of the original agreement that she should do so. That there was such an oral agreement is competent evidence, in connection with the other facts, to show that the papers, when left with Robertson, were not delivered, but merely left to await completion. When completed they were to be used by him according to the terms of the written contract, and they were in fact so used. It was a common case of an accommodation indorsement. The words written over the signature of Mrs. Rowell had no tendency to show the nature of her obligation. They were entirely consistent with any kind of an obligation, and as consistent with one as another. Without them her signature constituted an ordinary indorsement; with them it was neither less nor more. If she made any kind of a contract her separate estate would be chargeable for the performance of her undertaking as well

without these words as with them: Public Statutes, c. 147, sec. 2.

The case differs from *Tuttle v. Bartholomew*, 12 Met. 452, and *Belcher v. Smith*, 7 Cush. 482, in which the signature on the back of the note was appended to the special and peculiar contract of guaranty.

If there was a sufficient consideration for the notes between Robertson and her husband she was bound, for she signed before the notes were used, knowing that her husband was to use them. There was a valuable consideration moving from Robertson in his implied promise contained in the writing not to sue on the account until the maturity of the first note, nor afterwards if the notes were paid when due. It was immaterial whether she knew the nature of the consideration or not. It was enough that she gave her husband the use of her name and credit in his transaction with a third person: *Chicopee Bank v. Chapin*, 8 Met. 40; *Stoddard v. Kimball*, 4 Cush. 604, and 6 Cush. 469; *Hilton v. Smith*, 5 Gray, 400.

The cases which hold that knowledge of the consideration by one putting his name on a note for the accommodation of another is necessary to bind him are where a note had previously taken effect as a contract, and a new and independent consideration is required for the new contract: *Ellis v. Clark*, 110 Mass. 389; 14 Am. Rep. 609; *Pratt v. Hedden*, 121 Mass. 116; *Rogers v. Union Stone Co.*, 130 Mass. 581; 39 Am. Rep. 478. In such cases, the new contract being between the holder of the note and a new party, if the consideration moves from the holder it must be known to the signer or there is no mutuality, and it is not a consideration between the parties to the contract.

We are of opinion that on the facts reported there was a good consideration for the promise of the female defendant, and the case must stand for a further hearing.

So ordered.

HUSBAND AND WIFE—NOTE BY WIFE.—LIABILITY OF SEPARATE PROPERTY: See *Evans v. Calman*, 92 Mich. 427; 31 Am. St. Rep. 606. A married woman is personally liable on a note signed by her and her husband, and by her delivered to him to negotiate: *Nelson v. McDonald*, 80 Wis. 605; 27 Am. St. Rep. 71; *Binney v. Globe Nat. Bank*, 150 Mass. 574. A married woman's note creates an indebtedness against her if she has separate property or business: *O'Malley v. Ruddy*, 79 Wis. 147; 24 Am. St. Rep. 702. A note given by a married woman in payment of her husband's debts is valid, and her separate property may be applied in payment of it: *Deering v. Boyle*, 8 Kan. 525; 12 Am. Rep. 480; *First Nat. Bank v. Dohm*, 52 N. J. L. 363;

Colburn v. DeLoety, 28 Wm. 499. A married woman's separate property will be charged where she indorses notes as a surety for her husband: *Gove Exchange Ins. Co. v. Babcock*, 42 N. Y. 612; 1 Am. Rep. 631. But a married woman is not liable on her indorsement of a note transferred by her to secure the debt of a corporation in which she is a stockholder: *Russell v. People's Sav. Bank*, 59 Mich. 571; 33 Am. Rep. 444.

NEGOTIABLE INSTRUMENTS—LIABILITY OF ENDORSER—CONSIDERATION.—One who indorses a note before it is delivered to the payee is an original party to the note, and the original consideration for the note is the consideration for his undertaking: *Carroll v. Weld*, 13 Ill. 682; 56 Am. Dec. 484, and note; *Wright v. Morse*, 9 Gray, 337; 69 Am. Dec. 291, and note; note to *Riggs v. Wukie*, 55 Am. Dec. 353; *Geoff v. Martha*, 1 Col. 165; 91 Am. Dec. 706, and note.

MILLER v. CURTIS.

[153 MASSACHUSETTS, 137.]

EVIDENCE.—WHEN CHARACTER IS IN ISSUE it may be shown only by evidence of general reputation, and not by proof of specific acts.

EVIDENCE OF OTHER FALSE AND WRONGFUL ACCUSATIONS.—In an action by a married woman for an indecent assault, alleged to have been committed on her by the defendant, it is not proper to receive evidence, even in mitigation of damages, tending to prove that she, some twenty years before, had made false charges of a similar nature against other persons, and thereby obtained money from them.

IF EVIDENCE INCOMPETENT FOR ANY PURPOSE IS ADMITTED, and may have influenced the jury in determining a material issue, a new trial must be granted.

ACTION to recover for an alleged indecent assault upon plaintiff, a married woman. The defendant denied the commission of any assault upon plaintiff, and offered evidence, which was received by the court against her objection, tending to prove that at various times, about twenty years previously to trial, the plaintiff had made similar charges against other persons, and that such charges were false, and that on one occasion, in conversation with the witness Fottler, on stating that she had got money with which to purchase certain property, had further remarked that "She knew how to get money out of those rich old fellows," and that "As long as her husband did not find fault it was all right." Verdict for the defendant.

W. A. Gile and C. S. Forbes, for the plaintiff.

W. S. B. Hopkins and F. B. Smith, for the defendant.

KNOWLTON, J. The defendant was allowed to introduce evidence of several transactions and conversations with the plain-

tiff, all occurring more than twenty years ago, which tended to show that she had repeatedly made false charges of indecent assaults upon her, with a view to extort money from innocent men. The defendant denies the charge made against him in the suit, and contends that the plaintiff is trying unjustly to obtain money from him.

In any case, where the question is whether the defendant has committed a crime, it would naturally affect the opinion of jurors to know that he had often committed similar crimes; but evidence of such facts is never admitted to prove a defendant's guilt: *Commonwealth v. Jackson*, 132 Mass. 16; *Commonwealth v. Robinson*, 146 Mass. 571. That a person has committed one crime has no direct tendency to show that he committed another similar crime which had no connection with the first; and a person charged with one offense cannot be expected to come to court prepared to meet a charge of another. If the doing of one wrongful act should be deemed evidence to prove the doing of another of a similar character which has no connection with the first, issues would be multiplied indefinitely without previous notice to the defendant, and greatly to the distraction of the jury. It is too clear for argument, under the authorities, that most of the evidence excepted to was not competent on the question of liability, and the defendant does not seriously contend that it was.

It is argued, however, that it was competent on the question of damages, and the jury were instructed to consider it only on that question. There is much authority for the proposition, that in a suit of this kind, when a plaintiff seeks damages for an injury to her feelings, growing out of the indecency of the defendant's conduct, her character in regard to chastity is in issue, and her damages depend somewhat on the question whether she is a virtuous woman, who would be greatly shocked at the peculiar nature of the assault, or a woman who is accustomed to yield herself to illicit intercourse. There has been much difference of opinion among judges in regard to the evidence to be received in such cases. It has been held that evidence of general reputation in regard to chastity is competent, and sometimes that specific acts of lewdness may be shown, and sometimes that they may not: *Mitchell v. Work*, 13 R. I. 645; *Gore v. Curtis*, 81 Me. 403; 10 Am. St. Rep. 265; *Watry v. Ferber*, 18 Wis. 500; 86 Am. Dec. 789; *Ford v. Jones*, 62 Barb. 484; *Gulerette v. McKinley*, 27 Hun, 320, 324. See also *Sheahan v. Barry*, 27 Mich. 217; *Johnson v. Caulkins*,

1 Johns. Cas. 116; 1 Am. Dec. 102; *West v. Druff*, 55 Iowa, 335; *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100; *Love v. Masoner*, 6 Baxt. 24; 32 Am. Rep. 522; *Carpenter v. Wall*, 11 Ad. & E. 808; *Boynston v. Kellogg*, 8 Mass. 189, 8 Am. Dec. 122.

If it were permissible to show specific acts of criminal intercourse on the part of the plaintiff to affect the damages to be awarded in actions for an indecent assault, it would not follow that the evidence excepted to in the present case should have been admitted. Most, if not all, of this testimony tended to prove, not that the plaintiff had had criminal intercourse with other men, but that she had falsely pretended that others had indecently assaulted her, with a view to extort money from them. The rule contended for certainly should not be extended so far as to admit testimony of common crimes and ordinary wrongful acts, merely to show general depravity.

But we are inclined to hold the evidence incompetent on broader grounds. It is a general rule, which has been adhered to with great strictness in this commonwealth, that, when character is in issue, it may be shown only by evidence of general reputation, and not by proof of specific acts. This is the rule in actions of slander: *Chapman v. Ordway*, 5 Allen, 593; *Parkhurst v. Ketchum*, 6 Allen, 406; 83 Am. Dec. 639; *Clark v. Brown*, 116 Mass. 504; *McLaughlin v. Cowley*, 131 Mass. 70. So also in prosecutions for rape, where the character for chastity of the woman is involved: *Commonwealth v. Harris*, 131 Mass. 336. The same rule applies in criminal cases where the accused introduces evidence of his good character, and there is evidence in rebuttal: *Commonwealth v. O'Brien*, 119 Mass. 342; 20 Am. Rep. 325.

The principal reason for this rule is, that a multiplicity of issues would be raised if special acts, covering perhaps a lifetime, could be shown. It might be necessary to go into the circumstances attending each act before it could be determined what its nature was, and what effect should be given to it. It would be impossible for the opposing party to be prepared to meet evidence upon matters in regard to which he had no notice, and great injustice might be done by hearing biased and false testimony to which no answer could be made.

We are of opinion that it is safer and better, in cases of this kind, to adhere to the rule that excludes evidence of specific acts when offered for the purpose of showing character.

In *Gore v. Curtis*, 81 Me. 403, 10 Am. St. Rep. 265, this rule was applied to a case almost exactly like the one at bar.

There is some ground for the contention that the testimony of Fottler was admissible on the main issue, as a declaration of a purpose on the plaintiff's part to obtain money by falsely accusing men of making indecent assaults upon her. If it were clear that such a construction should be put upon the testimony, it would be competent. But, excluding the other incompetent evidence and taking it alone, it is too indefinite to show that the plaintiff referred to anything of this kind. It gives a remark made by her twenty-three or twenty-four years before the trial, in reference to getting "money out of these rich old fellows," without any intimation of how she got it.

The evidence excepted to was of a kind greatly to prejudice the plaintiff on the question of liability, and, it being incompetent for any purpose, it cannot be held that she was not injured by the admission of it: *Ellis v. Short*, 21 Pick. 142; *Brown v. Cummings*, 7 Allen, 507; *Crowell v. Porter*, 106 Mass. 80; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239. In this respect the case differs from those in which it is held that the admission of incompetent evidence on an issue which is made immaterial by the verdict does not render a new trial necessary when the evidence was not of a nature to prejudice the jury on the questions involved in their finding: See *Robinson v. Fitchburg etc. R. R. Co.*, 7 Gray, 92; *Lawler v. Earle*, 5 Allen, 22; *Anthony v. Travis*, 148 Mass. 53.

Exceptions sustained.

EVIDENCE—PROOF OF CHARACTER—GENERAL REPUTATION.—When character is at issue, the evidence should be confined to general reputation: *Carthaus v. State*, 78 Wis. 560; *State v. Bullard*, 100 N. C. 486; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, and evidence of particular facts is not admissible: *Commonwealth v. O'Brien*, 119 Mass. 342; 20 Am. Rep. 325; *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. St. 104; 80 Am. Dec. 467, and note; *Engleman v. State*, 2 Ind. 91; 52 Am. Dec. 494, note to *Wachstetter v. State*, 50 Am. Rep. 98; *People v. McLean*, 71 Mich. 309; 15 Am. St. Rep. 263, and note; *McQuirk v. State*, 84 Ala. 485; 5 Am. St. Rep. 381, and note; *Lamos v. Snell*, 6 N. H. 413; 25 Am. Dec. 468; *Sawyer v. Myer*, 2 Nott & McC. 511; 10 Am. Dec. 633.

NEW TRIAL GRANTED FOR ERROR IN ADMISSION OF EVIDENCE.—Improper evidence admitted against the objection of the defendant is ground for a new trial: *Innis v. Steamer Senator*, 1 Cal. 459; 54 Am. Dec. 305, and note, without inquiring how far such evidence influenced the verdict: *Nyers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744, and note. Immaterial evidence which may excite the prejudices or raise false impressions in the

mind of the jury if admitted, will be grounds for setting aside the verdict *Winkley v. Ayer*, 23 N. H. 171; 66 Am. Dec. 715, and extended note; *Leicester v. State*, 3 Cold. 249; 91 Am. Dec. 288, and note. The admission of incompetent evidence relative to the main point in controversy which might influence the mind of the jury is ground for a new trial: *Settle v. Allen*, 3 Ga. 201; 32 Am. Dec. 503, and note.

DUNHAM v. MORSE.

[153 MASSACHUSETTS, 182.]

INSURANCE—NOTE FOR WHEN MADE WITHOUT CONSIDERATION, AND VOID.—

A note given to the agent of an insurance corporation to procure insurance on the life of the maker is without consideration and void if the contract for insurance provides that it shall be void, unless the premium is paid in cash, and that none but certain designated officers have authority to waive the condition, and the agent receiving the note did not himself pay the premium to the insurer, nor do anything except to charge himself and credit the insurer with the amount of such premium, and the latter did not know that the payment had not been made in cash nor in any way waive the condition requiring such payment.

ACTION upon a promissory note. Defense of want of consideration.

J. F. Jackson, for the plaintiffs.

H. M. Knowlton and T. F. Desmond, for the defendant.

KNOWLTON, J. The only question in this case is whether the note declared on was given without consideration. The testimony shows that the only purpose of the defendant in giving it was to obtain insurance upon his life at once, instead of waiting for the action of the insurance company on his application. If a contract of insurance binding on the company was given him, the note is good; otherwise it is not.

The contract, which was signed and delivered by the plaintiffs as agents for the company, purported to give such insurance, but it was expressed to be subject to certain conditions printed on the back, one of which was that the contract was not valid unless the premium was "actually paid in cash." There was nothing to show that the agents had authority to alter the contract in this respect, and it was one of the conditions referred to that none but certain designated officers of the company had such authority: See *Kyte v. Commercial Union Assurance Co.*, 144 Mass. 48.

If this premium was not paid in cash, the contract of insurance was not binding on the company, and the note was

without consideration. It is not contended that the defendant made any payment in cash. He gave the agents the note in suit, payable ten days after date. The plaintiffs did not pay the insurance company any cash on account of this insurance until long after the policy had been tendered to the defendant and the contract had been repudiated by him. It is not contended by the plaintiffs that either of the parties was bound to anything by their negotiations, unless the contract delivered to the defendant was immediately binding upon the company. All the plaintiffs did to make it binding was to charge themselves with the amount of premium, and to give the insurance company credit for it on their books. It is true that the plaintiffs had been accustomed to keep money received for the company in their private bank account, with the knowledge and consent of the company; but this was not equivalent to an agreement that a credit on the plaintiffs' books should constitute a payment in cash to the company when no money had been received. Such an entry on the books was not payment in cash by the agents, and giving a note was not payment in cash by the insured.

The insurance company had no knowledge that the defendant had not paid his premium in cash, and did not waive the condition printed on the back of the contract. They might be willing to allow their agent to bind them by a contract if he received the premium in cash, even though he was permitted to deposit it in his own bank account, when they would not be willing to be bound on his promise to pay them if he had no cash, but only a promissory note, as his reliance for the means of performing his promise: *Whiting v. Massachusetts Ins. Co.*, 129 Mass. 240; 37 Am. Rep. 317.

This case differs from *Chickering v. Globe Ins. Co.*, 116 Mass. 321, *White v. Connecticut F. Ins. Co.*, 120 Mass. 330; *Wheeler v. Watertown Ins. Co.*, 131 Mass. 1, 7; and *Bouton v. American etc. Ins. Co.*, 25 Conn. 542. In each of these last-mentioned cases a payment in cash was not called for, but anything that could fairly be called payment, and which was accepted as such, would answer the requirements of the policy.

We are of opinion that the note was without consideration. Judgment on the finding.

NEGOTIABLE INSTRUMENTS—FAILURE OF CONSIDERATION.—A total failure of consideration is a good defense to an action on a promissory note: *Drew v. Tootle*, 27 N. H. 412; 59 Am. Dec. 380, and note; *Smith v. Hightower*, 76

Ga. 629; *Hall v. McArthur*, 82 *Ga.* 572; *Davis v. Davis*, 119 *Ind.* 511; *Blake v. Brown*, 80 *Iowa*, 277. A note not founded upon a consideration is void; *Dickinson v. Hall*, 14 *Pick.* 217; 25 *Am. Dec.* 390, and note; *Parson v. Nield*, 137 *Pa. St.* 385; 21 *Am. St. Rep.* 888, and note.

COMMONWEALTH v. WRIGHT.

[158 MASSACHUSETTS, 149.]

EXTRADITION BETWEEN THE STATES.—A fugitive from justice surrendered by a state to which he has fled, and returned to the state where he is alleged to have committed the crime for which he is demanded and surrendered, may in the latter state be tried for other offenses than those specified in the requisition, although the offenses were committed before he was demanded.

PUBLIC OFFICER—EVIDENCE.—It is not improper to permit a witness to testify that he was, at the time an assault was committed upon him, a district police officer and a deputy fish commissioner.

ARREST WITHOUT WARRANT.—For a statutory misdemeanor not amounting to a breach of the peace, such as having possession of short lobsters with intent to sell them, there is no authority in an officer to arrest without a warrant, unless it is given by statute.

AN OFFICER IS A TRESPASSER IF HE ATTEMPTS TO MAKE AN ARREST WITHOUT A WARRANT where he is not authorized to do so. If persons resisting such arrest are accused of committing assault and battery in so doing, they should be acquitted, unless they used excessive force in defending themselves or their property.

J. W. Cummings, for the defendants.

G. C. Travis, first assistant attorney-general, for the commonwealth.

FIELD, C. J. This is an indictment for an assault and battery. In the first count the defendants are charged with an assault and battery upon William H. Proctor, and in the second, with an assault and battery upon Peter Nelson. We infer that the defendants were found guilty upon both counts, although this does not appear in the papers before us. The exceptions recite: "At the trial it was claimed by the defendants, and admitted by the commonwealth (subject to all objections as to the competency of the evidence) that the defendants were brought from Newport, in the state of Rhode Island, where they resided, to Edgartown, in said Dukes county, upon the requisition of the governor of Massachusetts upon the governor of Rhode Island, wherein they were charged with an assault with intent to kill upon the said Proctor and Nelson. The defendants claimed, and asked the court to

rule, that they could not be tried upon the present indictment, but only for the offense for which they were extradited, and that they should be discharged. The court declined so to rule and to discharge the defendants, and ruled that the offer of proof was incompetent in bar of the prosecution of the defendants. The defendants objected, and excepted to the above ruling and refusal to rule." The copy of the complaint before the trial justice which has been sent to us, and on which the defendants were bound over for trial by the superior court, contains one count only, and it is for an assault with dangerous weapons upon William H. Proctor, with intent to kill and murder him, he being then a member of the district police, engaged in the execution of the duties of his office, as the defendants knew. There is no charge of an assault of any kind upon Nelson. We suppose that this is the complaint on which the requisition is founded, although the exceptions recite that the assault described in the requisition was with intent to kill "said Proctor and Nelson." We have not been furnished with a copy of the requisition. An assault with a dangerous weapon with intent to murder is punishable "by imprisonment in the state prison not exceeding twenty years": Public Statutes, c. 202, sec. 23; it is, therefore, a felony: Public Statutes, c. 210, sec. 1. A simple assault and battery is a misdemeanor. Upon an indictment for an assault with intent to murder, a defendant can be convicted of a simple assault, and it is conceded in this case that both the indictment and the complaint were supported by the same evidence, and were intended to include the same acts of the defendants. If the complaint, however, contained no charge of an assault upon Nelson, then the defendants have been tried for an assault not included in the complaint. The contention of the defendants is that they could not be tried for any other crime committed before they were surrendered than that for which they were demanded, according to the decision in *United States v. Rauscher*, 119 U. S. 407, as no opportunity was afforded them to return to Rhode Island after they were delivered up on the requisition, except on their recognizance to appear in the superior court, and to abide the order and sentence of that court. The contention is that the law is the same in extradition between states of the United States as between the United States and foreign nations. The first contention of the attorney-general is, that, by proceeding to trial upon a plea of not guilty, the defendants have waived any

such defense. It is true that, if the defendants were entitled to be discharged from arrest upon the indictment under the rule of *United States v. Rauscher*, 119 U. S. 407, this is not strictly a defense to the indictment. An indictment could properly have been found against the defendants while they were in the state of Rhode Island, and they could properly be tried on this indictment at any time when they could be lawfully arrested and held to answer to it. They might voluntarily come within this commonwealth and be arrested here, or be brought here for trial by a requisition for the identical crime charged in the indictment. The defendants could not be entitled to a verdict and judgment of not guilty on this indictment because they had been unlawfully held in arrest to answer to it, and thus be thereafter free from any prosecution for the offense by pleading this judgment in bar of another prosecution. If the facts and the law are as the defendants contend, they were entitled to be discharged from custody until they had had a reasonable opportunity to return to Rhode Island. This question, we think, could properly have been raised by a motion or petition to the court, and, if the facts were disputed by the commonwealth, we think that it was for the court to find the facts. In some cases a special plea has been allowed, but it seems to us that in the nature of things it is not strictly a plea to the indictment, but an application to the court to be discharged from custody, which should be tried and determined by the court in much the same manner as a similar application on a writ of *habeas corpus*: See *United States v. Rauscher*, 119 U. S. 407; *Ex parte McKnight*, 48 Ohio St. 588; *Blandford v. State*, 10 Tex. App. 627; *Commonwealth v. Hawes*, 13 Bush, 697; 26 Am. Rep. 242; *State v. Vanderpool*, 39 Ohio St. 273; 48 Am. Rep. 431; *United States v. Watts*, 8 Sawy. 370.

We deem it unnecessary to determine, however, whether the defendants have seasonably and properly taken this objection, because we are of opinion that the law is not as the defendants contend.

The decision in the *United States v. Rauscher*, 119 U. S. 407, rests upon the construction of the treaty of 1842 between Great Britain and the United States, and of the statutes of the United States passed to carry into effect treaties or conventions of extradition with foreign countries, now found in the United States Revised Statutes, sections 5270, 5272, and 5275. Before this decision the government of the United

States had demanded of the government of Great Britain the extradition of Ezra D. Winslow, and the correspondence of the two governments had disclosed that they did not agree upon the construction to be put upon the treaty of 1842. A full account of this discussion is found in Moore on Extradition, sections 150 et seq., and in Spear on Extradition, 2d ed., 163.

The result of the controversy was that the United States refused to give any assurance to the British government that Winslow, if surrendered, would not be tried for other offenses than those specified in the demand for extradition without first giving him an opportunity to return to Great Britain, and therefore Great Britain, in accordance with her own statutes concerning extradition, refused to surrender him. The crimes charged against Winslow were not offenses against the laws of the United States, but against the laws of the commonwealth of Massachusetts.

One ground on which the secretary of state of the United States refused to give the assurance required by Great Britain was, that "neither the president, nor any officer of the federal government, has power to control or to dismiss the prosecution in Winslow's case, or in any case where the offense is against the laws of one of the states, and could not give any stipulation or make any arrangement whatever as to the offenses for which he should be tried when returned to the justice of the state against whose laws he may have offended." Moore on Extradition, sec. 150. The treaties of the United States, and the statutes of the United States passed to carry such treaties into effect, are the law of the land, and are binding upon all state courts, as well as upon the courts of the United States. If it were only a violation of good faith on the part of the United States to procure the extradition of fugitive criminals from a foreign country on a charge of one crime, and then to try them for another, this would not enable a criminal to procure his discharge by the courts as a matter of right; but the president of the United States, through the attorney-general of the United States, might, if he saw fit, direct a discontinuance of any such prosecution in the courts of the United States. It was however, to say the least, doubtful whether the president had any power whatever over prosecutions in state courts for offenses against the laws of the state. It was thus possible for the state authorities to involve the government of the United States in serious

controversies with foreign nations unless it was the law of the land that an alleged criminal surrendered by a foreign country, charged with one crime, could not be tried for another in any court without first having had an opportunity afforded him to return to the place from which he had been surrendered. This consideration had some weight with the supreme court of the United States in *United States v. Rauscher*, 119 U. S. 407. The principal grounds of the opinion of the majority of the court in that case were, that the treaty of 1842 did not include all crimes, but only certain specified crimes; that no duty of delivering up fugitive criminals rests upon a foreign nation except by convention, and that the language of the treaty implied that criminals should not be surrendered except for the crimes specified; that the explicit language of section 5275 of the Revised Statutes of the United States, viz: that "the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter," also implied that he was to be tried only for the specific offense for which he had been surrendered, unless he voluntarily remained within the United States; and that the modern practice of most foreign nations, and the opinion of the most recent text-writers on international law, tended to support this view of the duty imposed by a treaty of extradition, and of the rights acquired by the accused under it and the statutes passed to carry such treaties into effect.

Upon the question whether the same rule should be applied to what has been called extradition between states of the United States under the constitution of the United States, the decisions are not uniform, but the weight of authority seems to be that the rule is not applicable: *People v. Cross*, 135 N. Y. 536; 31 Am. St. Rep. 850; *Ham v. State*, 4 Tex. App. 645; *State v. Stewart*, 60 Wis. 587; 50 Am. Rep. 388; *Waterman v. State*, 116 Ind. 51; *Contra: State v. Hall*, 40 Kans. 338; 10 Am. St. Rep. 200; *Ex parte McKnight*, 48 Ohio St. 588; *In re Cannon*, 47 Mich. 481, and *Compton v. Wilder*, 40 Ohio St. 180, relate to an arrest on civil process of the person surrendered. This question has been elaborately discussed in *Moore on Extradition*, sections 642 et seq., and in *Spear on*

Extradition, 2d ed., 525 et seq., and all the authorities up to the time of the publication of these books are there cited. These text-writers reach opposite conclusions.

If the true construction of article 4 section 2, clause 2, of the constitution of the United States is that "the state having jurisdiction of the crime" cannot try the person delivered up for another crime than that for which he has been demanded, if committed before the demand was made, without it first gives him a reasonable opportunity to return to the state from which he has been demanded, then it is the law of the land, and the state courts must obey it. But this clause, we think, is not subject to any such construction. The clause includes every crime in the state from which the person charged with crime has fled. This has been uniformly the construction put upon it by the courts: *Kentucky v. Dennison*, 24 How. 66; *Brown's case*, 112 Mass. 409, 17 Am. Rep. 114. Even if this clause should be held to include only such crimes as were known to the common law, or to the states when the constitution of the United States was adopted, it would include simple as well as aggravated assaults. At the time when the constitution was adopted, the courts of England and of this country, so far as we are aware, tried all accused persons brought before them charged with crimes within their jurisdiction, without regard to the legality of the methods whereby the accused had been arrested and brought before the courts. Now, when a person who has committed a crime in one state, and has fled to another or to a foreign country, has been brought back by force and without right, it has been held that the courts cannot discharge him on his application. This, it is true, involves no federal question, but the cases are cited in *Ker v. Illinois*, 119 U. S. 437, and *Mahon v. Justice*, 127 U. S. 700. The decisions are that this is a matter for the executive departments of the governments, and not for the courts, and that if there has been a breach of good faith the criminal has thereby acquired no right to be discharged by the court. In *Kentucky v. Dennison*, 24 How. 66, it was decided that the clause of the constitution we are considering was declaratory of a moral duty imposed on the states, and that there was no power in the courts of the United States to enforce it, or the statutes of the United States passed in pursuance of it.

A state ought undoubtedly to exercise good faith towards another state in proceedings under this clause, and it always is in the power of the prosecuting officers of a state to enter a

nolle prosequi on an indictment against a criminal whose presence has been obtained in violation of law. In the present case, it may be said that, as the duty of the state of Rhode Island was to surrender the defendants if charged with any crime committed in Massachusetts, there seems to be no want of good faith in prosecuting them for the criminal offense included in the requisition, even although the evidence submitted to the grand jurors did not convince them that the defendant had committed the crime with the aggravations alleged in the complaint. If the count in the indictment charging an assault upon Nelson is an additional offense, the evidence shows that it was a part of the same transaction alleged in the complaint. We find, however, nothing in the history of the insertion of this clause in the constitution of the United States which tends to show that the doctrine contended for by these defendants was in the minds of those who framed the constitution, or was considered by the people who adopted it. If we assume, notwithstanding the decision in *Kentucky v. Dennison*, 24 How. 66, that the statutes of the United States passed for the purpose of providing the methods whereby this clause of the constitution may be carried into effect are to be considered in any proper sense as laws, there is nothing in them which purports to give to the person to be delivered up the right to return to the state where he was found before he can be tried for any other crime than that for which he was demanded, and it has not been contended that Congress by statute could add to or take from the rights and duties of the states under this clause of the constitution: See U. S. Rev. Stats., secs. 5278, 5279.

If we turn to our own statutes on the subject (Pub. Stats., c. 218, secs. 1-11) we find there nothing which seems to limit the power of the courts of the commonwealth, or which expressly or impliedly requires these courts to discharge from arrest criminals surrendered under this clause of the constitution, if put on trial for other offenses than the offense for which they were delivered up, unless an opportunity has been afforded them to return to the state where they were found. Under this clause of the constitution, fugitive criminals from one state have no right of asylum in another state, whether the crime be political or non-political, whatever its nature or degree; and the reasons which influenced the supreme court of the United States in the decision of *United States v. Rauscher*, 119 U. S. 407, seem to have little

application to the rendition of fugitives from justice by one state to another under the constitution. We doubt, moreover, whether the doctrines of international law which that court invoked in that case were recognized as a part of the duty of nations towards each other when the constitution of the United States was adopted. However that may be, we are of opinion that the constitution makes it the duty of one state to surrender fugitives from justice when charged with any crime committed in another state, and imposes no limitation upon the right of the state to which they are surrendered to try them when surrendered for other offenses than those specified in the requisition, although the offenses were committed before the fugitives were demanded.

The crime which the defendants were suspected of having committed when Proctor went on board their sloop, as we understand the exceptions, was having in their possession what are called short lobsters with intent to sell them: See Pub. Stats., c. 91, sec. 84; Stats. 1884, c. 212, sec. 1; Stats. 1887, c. 314. No question is made that the place where the sloop was lying and the place where the traps were found were within the town of Gosnold in this commonwealth. The special statutory authority of the commissioners of inland fisheries, or their deputies, and of the members of the district police, to enforce the provisions of the statutes we have cited is found in Stats. 1884, c. 212, secs. 3, 4; Stats. 1885, c. 256, sec. 1; Stats. 1888, c. 389, sec. 2. The manner of the appointment of the district police and their general powers are shown in Pub. Stats., c. 103, secs. 1, 2: See Stats. 1885, c. 131; Stats. 1887, c. 256; Stats. 1888, cc. 113, 389, 426, sec. 13; Stats. 1891, cc. 302, 357, sec. 6. In general, the district police have "all the powers of constables (except the service of civil process), police officers, and watchmen": Pub. Stats., c. 103, sec. 2. The commissioners on inland fisheries are appointed by the governor by and with the consent of the council, and they may act personally or by deputy: Pub. Stats., c. 91, secs. 2, 3. The deputies, as we understand, are appointed by the commissioners, as deputy sheriffs are appointed by the sheriff.

William H. Proctor was allowed to testify, against the defendants' objection, that he was, at the time of the assault, a district police officer and a deputy fish commissioner. We think that the evidence was competent. Whether standing alone, without evidence that he had previously publicly performed the duties of each of these offices, it would be suffi-

cient to warrant the jury in finding that he actually held these offices by legal appointment, is a question, we think, not raised by the exceptions: *Commonwealth v. Kane*, 108 Mass. 423; 11 Am. Rep. 373; *Commonwealth v. Tobin*, 108 Mass. 426; 11 Am. Rep. 375; Greenleaf on Evidence, secs. 83, 92. There was perhaps evidence that the defendants knew or believed that Proctor was an officer engaged in enforcing the laws relating to lobsters, and that for this reason they sought to avoid him, even before he stated, "I am a state officer, and am coming on board." The defendants were not indicted for an assault upon an officer, but if Proctor was an officer, and the defendants knew it, and if he had the right to arrest them without a warrant, they lawfully could make no resistance to the arrest. If Proctor was not an officer, or if, being an officer, he had no right to arrest the defendants without a warrant, they could use reasonable force in preventing an arrest. It is conceded that Proctor did not have a warrant, and that he testified that when he went on board the sloop he intended to arrest the defendants. It has been argued that Proctor, either as deputy fish commissioner or district police officer, or both, had a right to search the sloop for lobsters under Statutes of 1885, chapter 256. The counsel for the defendants argues that this provision concerning the right of search is unconstitutional. It appears, however, that Proctor did not go on board the sloop for the purpose of searching for lobsters, but of arresting the defendants; and it does not appear that he represented to the defendants that he boarded the sloop to search for lobsters. We think, therefore, that this provision of the statutes cannot be invoked for his protection, and that it is unnecessary to consider it.

At the argument in this court the counsel for the defendants waived the contention that the statute was unconstitutional which makes the possession of short lobsters with intent to sell them a crime. His principal contention was that even if the jury found that the defendants were in possession of short lobsters with intent to sell them, Proctor, either as deputy fish commissioner or as district police officer, had no right to arrest them without a warrant. There is no statute authorizing such an arrest, for we do not consider Statutes of 1885, chapter 220, section 6, as applicable to the case. It is suggested that the statutory misdemeanor of having in one's possession short lobsters with intent to sell them is a continuing offense, which is being committed while such possession continues, and that

therefore an officer who sees any person in possession of such lobsters with intent to sell them can arrest such person without a warrant as for a misdemeanor committed in his presence. We are of opinion, however, that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant, unless it is given by statute: *McLennon v. Richardson*, 15 Gray, 74; 77 Am. Dec. 853; *Commonwealth v. O'Connor*, 7 Allen, 583; *Scott v. Eldridge*, 154 Mass. 25; *People v. McLean*, 68 Mich. 480; 1 Bennett and Heard's Lead. Cas. 201; 1 Bishop's Criminal Procedure, 3d ed., secs. 166-183; *Commonwealth v. Tobin*, 108 Mass. 426; 11 Am. Rep. 375. The legislature has often empowered officers to arrest without a warrant for similar offenses, which perhaps tends to show that, in its opinion, no such right exists at common law: See, for example, Stats. 1886, c. 276, sec. 8; Pub. Stats., c. 100, sec. 43; c. 203, secs. 100, 104; c. 207, secs. 41, 43. If Proctor had no right to arrest the defendants without a warrant, and he boarded the sloop for that purpose, he was a trespasser, and the question for the jury would be whether the defendants used excessive force in defending themselves and their property: *Commonwealth v. Clark*, 2 Met. 23; *Brown v. Gordon*, 1 Gray, 182; *Commonwealth v. Cooley*, 6 Gray, 350. The court should have ruled that Proctor, even if he held the offices he claimed to hold, had no authority, under the circumstances shown, to arrest the defendants without a warrant.

Exceptions sustained. —

EXTRADITION—DETENTION FOR OTHER OFFENSE: See notes to *Matter of Fetter*, 57 Am. Dec. 400, and *State v. Hall*, 10 Am. St. Rep. 207. Fugitives from justice fleeing from one state to another and surrendered on demand may be tried for any offense committed by them in the state to which they are returned, though the offense may have been committed before the demand and surrender: *Lascelles v. State*, 90 Ga. 347; *ante*, 216, and note. See *People v. Cross*, 135 N. Y. 536; 31 Am. St. Rep. 850, and note.

ARREST WITHOUT WARRANT.—An arrest without a warrant, for a misdemeanor, by an officer of the peace who does not see the offense committed is illegal; nor will suspicion that the party has committed a misdemeanor on a previous occasion justify the arrest without a warrant: *Pinkerton v. Verberg*, 78 Mich. 573; 18 Am. St. Rep. 473, and note. No arrest can be made for a misdemeanor unless by a warrant upon a complaint duly made, or by an officer or bystander who sees the offense committed: *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608, and note with cases collected. See notes to *Roberts v. State*, 55 Am. Dec. 104, and *Eanes v. State*, 44 Am. Dec. 292. Where an offense is punished by imprisonment in the state prison, unless it is expressly declared to be a misdemeanor, an officer may arrest for its commission without process: *Firestone v. Rice*, 71 Mich. 377; 15 Am. St. Rep.

266, and note. A peace officer cannot make an arrest in this state for a misdemeanor committed in another state without a warrant: *Scott v. Eldridge*, 154 Mass. 25. The right of officers to arrest for breaches of the peace committed in their presence is sustained by the following cases: *People v. Johnson*, 86 Mich. 175; 24 Am. St. Rep. 116, and note; *Martin v. State*, 89 Ala. 115; 18 Am. St. Rep. 91, and note; *Veneman v. Jones*, 118 Ind. 41; 10 Am. St. Rep. 100, and note; *State v. Dierberger*, 96 Mo. 666; 9 Am. St. Rep. 380; *Pratt v. Brown*, 80 Tex. 608.

EVIDENCE—PROOF OF OFFICIAL CHARACTER.—The official character of a deceased person may be shown by the evidence of witnesses who testify that at the time he was killed he was acting as town marshal and wore a badge and carried a policeman's baton: *Martin v. State*, 89 Ala. 115; 18 Am. St. Rep. 91. And see the cases from this series cited in the opinion to the leading case.

ARREST WITHOUT AUTHORITY—RESISTANCE TO.—A person resisting an attempted arrest by one acting without authority has the right to use only such force as is necessary to protect himself from assault: *Creighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 143, and note. A killing under such circumstances has been held manslaughter: *Croom v. State*, 85 Ga. 718; 21 Am. St. Rep. 179, and note; *Jones v. State*, 26 Tex. App. 1; 8 Am. St. Rep. 454, and note. See also *Pakner v. People*, 138 Ill. 356; 32 Am. St. Rep. 146, and note.

SMITH v. HALE.

[158 MASSACHUSETTS, 173.]

RESCISSIION.—A BREACH OF WARRANTY upon a sale of personal property authorizes the purchaser to rescind the contract and return the article, although there was no express agreement to that effect, and no fraud.

RESCISSIION—RIGHT TO ENTER UPON LAND TO RECLAIM PROPERTY.—If one of the parties to an exchange of personal property having the right to rescind elects to do so, and demands the return of the property received by the other party, on whose premises it is, a refusal of such demand justifies an entry on such premises for the purpose of taking and carrying away the property so demanded.

RESCISSIION BY OFFERING TO RETURN ARTICLE AFTER IT IS BROKEN.—If one who exchanges a buggy warrants it will carry a specified weight, and one of the springs upon the buggy being subjected to such weight breaks, the fact that the spring is so broken does not defeat the right to return the buggy and rescind the contract.

WARRANTY—PROOF OF RELIANCE UPON.—An instruction that the jury must find against the party relying upon a warranty, unless in the case there was oral testimony from him of his reliance thereon, is properly refused if, from the other evidence, the jury might well find that he did rely on the warranty, though in his testimony he did not say so in express terms.

WARRANTY, WHERE PARTY ACTS UPON HIS OWN JUDGMENT.—One who examines an article himself and relies on his own judgment, may at the same time protect himself by taking a warranty, and, if the warranty proves false, may rescind.

Two Actions, one for tort in breaking and entering plaintiff's close, and the other in replevin to recover a heifer. The defense to both actions was that the defendant had, for proper and sufficient cause, rescinded a contract by which she exchanged a heifer for a buggy, that on offering to return the buggy and demanding the return of the heifer, such demand was refused, and thereupon defendant entered upon plaintiff's premises and took the heifer therefrom, and this entry and taking constituted the cause for which recovery was sought in the first action. At the trial it appeared that the defendant and her husband, being together, met the plaintiff and entered into conversation with him respecting an exchange of her heifer for his buggy. The springs of the latter were of peculiar construction, and a fear that they were insufficient was expressed by defendant and her husband. Thereupon the plaintiff, it was claimed, stated or warranted that the buggy would carry the husband and wife and a hundred or two of meal. The buggy was examined carefully by the defendant and her husband at the time, and he told her if she wanted a buggy he did not know that she could do better than to take it, but she must use her own judgment. The exchange was effected. Three days later one of the springs of the buggy broke while it was in use and was not subjected to a weight greater than that warranted against. The defendant then went to see plaintiff and he, as she claimed, agreed to make certain repairs. After waiting about two weeks for these repairs the defendant claimed the right to rescind the exchange, offered to return the buggy, and demanded the heifer, and this being refused, entered plaintiff's barn in his absence and took the heifer therefrom. The following are the instructions asked by plaintiff and refused by the court: "1. If there was in the case no oral testimony from the defendant of any reliance by her upon the alleged warranty, they should find for the plaintiff; 2. In order to rescind the contract, the defendant was bound, within a reasonable time, to restore to the plaintiff the buggy in as good condition as she received it; 3. Where a purchaser inquires for himself and acts upon his own opinion, he cannot say that he has been misled by a false statement of another; and if he inspects and examines the article for himself, and selects it after exercising his own judgment upon its character and quality, the vendor only warrants that the article, so far as he knows, is what it appeared to be, and what he believed it to be at the time he

sold it." The court then instructed the jury as follows: "A warranty may be made without any set form of words. It is not necessary to use the words 'I warrant,' but when a person who has an article for sale makes a representation of fact in regard to the article as true, and the party who buys the article relies upon that representation as an inducement for the purchase or sale, that would be a warranty for which the plaintiff would be liable in case of any breach. Now, if you are satisfied from the evidence that the plaintiff made a certain warranty of that wagon, and that the defendant relied upon that warranty in making the purchase of the wagon or trade, and that there was a breach of that warranty, that would authorize the defendant to return the wagon to the plaintiff, and to demand of him the heifer which she traded for it in return, and it would be his duty to receive the property and give the heifer back. The defendant claims that there is a warranty of a certain kind. The burden is upon her to show that there is a warranty. Whatever proposition is set up by her, she must maintain by a fair preponderance of the evidence." The plaintiff also asked for an instruction that even if the defendant was entitled to rescind she had no right to enter the plaintiff's premises to take the heifer. This request being refused, the court upon this subject instructed the jury as follows: "Now, if it is true, that, at the time when she took this heifer away, he was the owner of it, and she had no right to the possession of it, if you find that to be the fact, he is entitled to maintain his action, and the verdict should be for the plaintiff; and if, on the other hand, you should find upon all the evidence that the heifer did not belong to him, but belonged to the defendant, she would have the right to come upon his premises, committing no breach of the peace and breaking no doors or bars, or anything else, and if she had a right to the possession of the heifer she would have a right to do what she did in taking it away. . . . But if you find that there was a breach of the warranty, and she relied upon the warranty in purchasing the wagon, and if you find that the breach of the warranty never was settled, then she would have a right to return the wagon and demand her heifer back. And if he refused to give it up to her she would have a right to enter upon his premises, if she could do it peaceably in the manner described by her, and take the heifer away, and he would have no right

of action against her." Verdict for the defendant in both cases, plaintiff excepted.

F. L. Greene, for the plaintiff.

S. T. Field, for the defendant.

ALLEN, J. It is settled in this commonwealth that a breach of warranty upon a sale of personal property authorizes the purchaser to rescind the contract and return the article, although there was no express agreement to that effect, and no fraud: *Bryant v. Isburgh*, 13 Gray, 607, 74 Am. Dec. 655. It has been found in this case that there was such breach of warranty and right of rescission. The bill of exceptions states that there was evidence tending to show that the defendant, claiming a right to rescind, left the buggy upon the plaintiff's premises, and demanded the heifer, and that the plaintiff refused to give up the heifer and forbade the defendant to take it. Though it is not expressly stated in the bill of exceptions that these facts appeared to be true, yet the plaintiff's brief relies on the plaintiff's prohibition as proved, and assumes the truth of the above facts, and therefore we assume them to have been proved.

The most important question in the case is, whether on these facts the defendant had a right to enter upon the plaintiff's premises and reclaim her heifer. We are of opinion that she had. It is true that it has been held that, where nothing appears except that the goods of one person are upon the land of another, the owner of the goods has no implied license from the owner of the land to enter and take them away: *Anthony v. Haney*, 8 Bing. 186; 2 Greenleaf on Evidence, sec. 627. And this rule has been applied to the case of a mortgage of personal property before foreclosure, if the goods have been left in the mortgagor's possession: *McLeod v. Jones*, 105 Mass. 403; 7 Am. Rep. 539. But after foreclosure the mortgagee has an implied irrevocable license to enter and carry away his goods: *McNeal v. Emerson*, 15 Gray, 384. Where a piano was hired for an indefinite time, with no agreement giving to the owner a right to enter the hirer's premises and reclaim the piano without prior demand or notice, it was held that he had no implied license to do so: *Smith v. Pierce*, 110 Mass. 35. But where one sells personal property which is on his own land, the purchaser has an implied license to enter, and take it away: *Nettleton v. Sikes*, 8 Met. 34; *Giles v. Simonds*, 15 Gray, 441; 77 Am. Dec. 373.

In the present case, on the facts assumed, the defendant had a right to the possession of her heifer under her bargain with the plaintiff, and it was the plaintiff's duty to restore it, and the defendant had demanded it, and the plaintiff had refused to deliver it, and in this state of things under the agreement between them the law gave to the defendant a right to enter and take away the heifer in the way in which she did it: *Drake v. Wells*, 11 Allen, 141; *Heath v. Randall*, 4 Cush. 195; Cooley on Torts, 50 et seq.

The plaintiff further contends that the defendant's right of rescission was lost because the buggy was broken, and therefore was not returned to him in the same condition in which it was when the defendant took it. But the breaking of the spring was just what the plaintiff had warranted against. It occurred without the defendant's fault. Under these circumstances, the plaintiff cannot complain of the accident to the buggy: *Head v. Tattersall*, L. R. 7 Ex. 7; *Elphick v. Barnes*, 5 C. P. Div. 321.

The first instruction requested was rightly refused. The jury might well find from the evidence that the defendant relied on the warranty, though in her testimony she did not say in express terms that she did so.

The plaintiff's second request for instructions was that "in order to rescind the contract the defendant was bound within a reasonable time to restore to the plaintiff the buggy in as good condition as she received it." He now raises the objection that the judge did not say to the jury that the return of the buggy must be within a reasonable time. But there was no controversy at the trial on this point. The defendant expressly conceded the doctrine as to reasonable time. The stress of the request turned upon the last portion of it, as to the condition of the buggy. It is true, that theoretical accuracy would have required a statement that the return must be within a reasonable time, if indeed that question was to be submitted to the jury at all. But the jury could not have been misled by the omission, and there is no occasion to grant a new trial on this ground.

The plaintiff's third request does not contain a correct statement of the law, applicable to the case. In the first place, there was no question of fraud, and no instructions on that hypothesis were called for; and as to the remainder of the request, it is enough to say that a purchaser of an article may examine it for himself, and exercise his own judgment

upon it, and at the same time may protect himself by taking a warranty. The refusal to give the instructions requested was entirely right: *Harrington v. Smith*, 138 Mass. 92, 98.

Exceptions overruled in both cases.

SALES—BREACH OF WARRANTY—BUYER'S RIGHT TO RESCIND.—A purchaser may rescind a contract of sale and return the article where there is a breach of an express warranty, although there was no agreement to that effect, and no fraud: *Bryant v. Isburgh*, 13 Gray, 607; 74 Am. Dec. 655, and extended note; *Hoadley v. House*, 32 Vt. 179; 76 Am. Dec. 167, and note; *Kuntzman v. Weaver*, 20 Pa. St. 422; 59 Am. Dec. 740; but on this point see *Allen v. Anderson*, 3 Humph. 581; 39 Am. Dec. 197. If a purchaser who has been deceived in a contract of sale, without fault on his part, chooses to rescind the contract, he is entitled to do so: *Fowler v. Williams*, 2 Brev. 304; 4 Am. Dec. 579; *Lide v. Thomas*, 2 Brev. 334; 4 Am. Dec. 581; *Whitworth v. Thomas*, 83 Ala. 308; 3 Am. St. Rep. 725, and note; *Young v. Arnatz*, 86 Ala. 116; *Johnson v. Seymour*, 79 Mich. 156; *Gale etc. Mfg. Co. v. Stark*, 45 Kan. 606; 23 Am. St. Rep. 739, and note with the cases collected, discussing the right to rescind upon the breach of an express warranty. See notes to *Pierson v. Crooks*, 12 Am. St. Rep. 843, and *Getty v. Roundtree*, 54 Am. Dec. 146.

SALES—EXPRESS WARRANTY—PURCHASER'S LIABILITY.—The purchaser's knowledge of the existence of a defect does not exempt the seller from liability upon his express warranty of the soundness of a chattel: *Stucky v. Clyburn*, Cheve's L. 186; 34 Am. Dec. 590. It is no defense against a warranty that the buyer might have discovered the defect by an examination of the article: *Meickle v. Parsons*, 66 Iowa, 63; 55 Am. Rep. 261, and note. An inspection by the buyer before acceptance will not deprive him of the protection of a warranty as to latent defects: *Miller v. Moore*, 83 Ga. 684; 20 Am. St. Rep. 329, and note. A vendor will be held liable for patent defects in an article sold, if he so stipulates in the warranty: *Watson v. Roode*, 30 Neb. 264.

HASKINS v. KENDALL.

[158 MASSACHUSETTS, 224.]

INSURANCE ON LIFE OF HUSBAND, PAYABLE TO HIS WIFE, should be considered as payable to her only in the event of her surviving him. On her death in his lifetime, a resulting trust arises in favor of his estate. This rule is equally applicable to a certificate by a mutual aid society of which the husband was a member, and the assessments of which were paid by him.

CONTEST between the representatives of a deceased husband and wife to determine which estate was entitled to the proceeds of two benefit certificates issued by a mutual aid society. The husband, being a member of the society, received two certificates, payable to his wife. He paid all the assessments thereon. She died in 1889 and he in 1891, both intestate.

Among the by-laws of the society was the following: "Where a beneficiary is the wife of a member, no transfer can be made except with her written consent, but in all other cases a member may change the beneficiary by a return of the certificate, with the request of such change in writing." Henry W. Haskins was the administrator both of the husband and the wife, and received the proceeds of the certificates on giving a receipt in both capacities. On the application of one of the heirs of the wife, who was not related to the husband, an order was made that the administrator account for these proceeds in his capacity as administrator of the wife.

C. L. Gardner, for the appellee.

J. I. Cooper, for the appellant.

LATHROP, J. It is not contended by the appellee that the certificates originally issued to Jonathan H. Haskins by the Massachusetts Mutual Aid Society for the benefit of his wife, were not legally surrendered. It is contended in her behalf that the certificates issued in place of the original certificates, being issued after the passage of the statutes of 1885, chapter 183, vested such an interest in them in his wife, that, notwithstanding her death before that of her husband, the proceeds of the certificates upon their collection belong to her estate.

The applications for the certificates were made by Jonathan H. Haskins, and all assessments were paid by him. Even if this had been a case of life insurance, in the absence of any statute giving the wife a vested interest in the policy, or of some provision in the policy giving a right to her representatives, the contract would be construed as payable to the wife only in case of her surviving her husband, and on the failure of the contingency there would be a resulting trust in his favor: *Fuller v. Linzee*, 135 Mass. 468; *Bancroft v. Russell*, 157 Mass. 47.

While the rights of a wife and children are protected in the case of a policy of life insurance for their benefit, it has not yet been held by this court that if they die before the person effecting the insurance there would not be a resulting trust in his favor, in the absence of language in the policy giving rights to the legal representatives of the wife and children.

While the statutes of 1885, chapter 183, section 1, provide that, "If the benefit is to accrue through the death of the insured person, the contract shall be of life insurance," and by section 13 certain powers are given to the insurance commis-

sioner which are conferred upon him by the Public Statutes, chapter 119 the same section provides that, "nothing herein contained shall subject any corporation doing business under this act to any other provisions or requirements of said chapter, except as distinctly set forth herein."

The contract in the case at bar does not, therefore, come within the provisions of the Public Statutes, chapter 119, section 167, but within the general rule above stated. While under a by-law of the society Jonathan H. Haskins could not transfer the certificates without his wife's written consent, we are of opinion that this did not vest such an interest in her that her next of kin would be entitled to the proceeds of the certificates if she died before him.

It follows that the decree of the probate court must be reversed, and the case remanded to that court for further proceedings.

So ordered.

INSURANCE—BENEFIT SOCIETY—DEATH OF BENEFICIARY BEFORE ASSURED. Where the beneficiary named in an insurance certificate dies before the insured no interest in the fund vests in the beneficiary, and her heirs will inherit no part of the fund by virtue of their relationship: *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. 260, and note; to the same effect, see *Tompkins v. Levy*, 87 Ala. 263; 13 Am. St. Rep. 31, and note. This question is discussed at length in the monographic note to *Hooker v. Sugg*, 11 Am. St. Rep. 723, 724.

CARDINAL v. HADLEY.

[158 MASSACHUSETTS, 352.]

DEED, EVIDENCE AS TO CONSIDERATION.—A statement of the consideration in a deed and a recital of its payment may be varied and controlled by parol evidence. Therefore, notwithstanding such statement and recital, evidence may be admitted to prove that the price of the land was to depend on the number of square feet in its area, and that by reason of a mistake in computing such area the plaintiff paid a greater sum than was due from him.

WAIVER.—THE RIGHT TO RECOVER A SUM PAID IN EXCESS OF THE PURCHASE PRICE of a tract of land is not waived by accepting a conveyance thereof when the payment of such excess was due to a mistake made in computing the area of such tract.

MISTAKE, WAIVER OF RIGHT TO SUE FOR.—If owing to a mistake in computing the area of a tract of land the vendee paid a sum greater than was due from him, he is not precluded from recovering the excess by accepting a deed of the property, nor by paying, after the discovery of the mistake, a note given in part payment of the purchase price.

ACTION for money had and received. The plaintiff purchased a lot of land of the defendant, and agreed to pay therefor at the rate of eleven and a half cents per square foot. At the time of the sale a computation was made by the plaintiff of the sum due, and payment was made accordingly, part of the sum so paid being a note of the plaintiff. Before the note was paid the plaintiff caused the land to be measured, and ascertained that its area was considerably less than that upon which the computation had been based and payment made. The plaintiff thereafter brought this action for the purpose of recovering the amount of his overpayment. He did not claim that the defendant had been guilty of any fraud, and there was no doubt that plaintiff had acquired title to all the land contemplated in his purchase; but on the other hand, it was not questioned that the area of the land was such that at the price agreed to be paid the defendant had received a greater sum than he was entitled to. The defendant contended that the plaintiff, by accepting the deed, had waived all right of action; that he could not in opposition to the deed show by parol evidence that the purchase price depended upon the number of square feet in the lot. The trial court held otherwise; judgment for the plaintiff.

F. M. Davis, for the defendant.

H. Dunham, for the plaintiff.

BARKER, J. 1. The exceptions to the admission of oral evidence, and to the refusal to rule that the plaintiff could not show by such evidence that the price of the land was to depend upon the number of square feet in its area, must be overruled. It was long since declared by this court to be well settled that both the statement of consideration in a deed and the recital of its payment may be varied and controlled by parol evidence: *Gale v. Coburn*, 18 Pick. 397, 401; *Clapp v. Tirrell*, 20 Pick. 247, 250. See also *Wallis v. Wallis*, 4 Mass. 135; 3 Am. Dec. 210; *Wilkinson v. Scott*, 17 Mass. 249, 257; *Preble v. Baldwin*, 6 Cush. 549, 553; *Paige v. Sherman*, 6 Gray, 511, 513; *Miller v. Goodwin*, 8 Gray, 542; *Egan v. Bowker*, 5 Allen, 449; *Pickman v. Trinity Church*, 123 Mass. 1, 8; 25 Am. Rep. 1.

2. The plaintiff did not waive his right by accepting the deed. He bought land by the square foot, and in fixing the sum to be paid the area was not estimated, but was computed, and a mistake against him was made in the computation.

In ignorance of the mistake he paid the sum so computed, and after discovering the mistake brought his action to recover the amount overpaid by reason of the mistake.

The case is easily distinguished from those upon which the defendant relies to show a waiver of the right of action by accepting the deed. In *Williams v. Hathaway*, 19 Pick. 387, the land was sold by the estimated area. *Pickman v. Trinity Church*, 123 Mass. 1, 8, 25 Am. Rep. 1, cited by the defendant, is a plain authority against him. In that case the mistake was not one of computation, but arose from a misapprehension as to the title of a strip of land covered by a wall. *Lewis v. Jewell*, 151 Mass. 345, 21 Am. St. Rep. 454, was an action for false representations of quantity in a sale of carpets, and has no bearing on the present case, turning only on the question as to whether the purchaser used due diligence in relying on the representations of the seller. The case also differs from that of *Noble v. Googins*, 99 Mass. 231, because there the price was an entire sum, in fixing which no regard was had to the area, while in the case at bar the quantity of land was made an essential element of the bargain. The case at bar is analogous to the cases of *Paige v. Sherman*, 6 Gray, 511, *Tarbell v. Bowman*, 103 Mass. 341, and *Pickman v. Trinity Church*, 123 Mass. 1, 8, 25 Am. Rep. 1, in each of which the price depended upon the area, and was erroneously fixed and paid under a mistake of fact. Because the agreement here was not for an entire sum, and the quantity of land was an essential element of the bargain, and fixed the price to be paid, the plaintiff did not waive his right to recover the money paid by mistake by accepting a deed which was silent as to the quantity of land, although the description was by monuments, and also by measurements stated to be "more or less." The deed shows clearly enough that no other land was intended than the lot within the monuments, but has no tendency to show that the parties agreed that its area was as computed by them when fixing the sum to be paid for the land. It has no bearing on the present issue.

3. The payment of the note after the discovery of the mistake is no bar to the action. It was originally received as cash, and its amount is not stated. There is nothing to show that it would not have been given if there had been no mistake. The defendant has not been harmed by its payment, and the plaintiff was not compelled to expose himself to a suit by attempting to set off against it his present cause of action.

Exceptions overruled.

DEEDS—PAROL EVIDENCE AS TO CONSIDERATION.—The consideration of a deed may be proved by parol to be wholly different from that expressed therein: *Moffatt v. Bulson*, 96 Cal. 106; 31 Am. St. Rep. 192; note to *Byers v. Locke*, 27 Am. St. Rep. 215, where the cases are collected.

MISTAKE AS TO AMOUNT OF LAND SOLD—RIGHT TO RECOVER EXCESS OR DEFICIT IN PURCHASE PRICE.—Where a vendor believes he is selling and a vendee believes he is buying a definite piece of land, and a deficit in quantity is caused by a conflict of the survey with an older and better title unknown to both, it is such a mistake of fact as to entitle the vendee to recover the amount paid for the deficit: *Emerson v. Navarro*, 31 Tex. 334; 98 Am. Dec. 534, and note; note to *Goodrich v. Lathrop*, 28 Am. St. Rep. 93. See also *Johnson v. Leflingwell*, 74 Iowa, 114.

ROBINSON v. BIRD.

[158 MASSACHUSETTS, 387.]

AUCTIONEER IS LIABLE FOR SELLING THE PROPERTY OF ANOTHER unless he can show some other excuse or justification than his good faith and his ignorance of the true owner's title.

CONDITIONAL SALE.—AN AGREEMENT, PURPORTING TO BE A LEASE, between the owners of property and another, and stipulating that the latter, for the use of certain personal property, had paid a specified sum as rent, and would pay a further designated sum monthly until such time as the sums so paid should amount to another sum specified, after which such property should belong to the lessees, but that in default of payment such lessors might, without demand, take possession of such property, does not give the lessees any title which they can mortgage to the prejudice of the lessors. If a mortgage is made, and thereafter, by the direction of the mortgagee, the property is sold by an auctioneer, he is answerable to the owners for its conversion if the lessees were in default at the time of such sale, and therefore had no right to the immediate possession of the property. It is not material that the auctioneer was mistaken as to the ownership of the property if the owners had not contributed to such mistake otherwise than by entering into the agreement and giving the lessees possession thereunder.

RECORDING A MORTGAGE MADE BY THE LESSEES OF PERSONAL PROPERTY having the right to acquire title thereto on making certain designated payments does not operate as constructive notice to their lessors.

TROVER for the conversion of certain furniture. Plaintiffs, in February, 1886, made an agreement with Mrs. Bryant, which, on its face, declared that as rent for certain property, including that in controversy, they had received a sum specified in the agreement, and that Mrs. Bryant promised further to pay them thirty-two dollars per month on the thirteenth day of each month until such payments with the original payment should amount to ten hundred and fifty-six dollars and eighty-six cents, after which the rents should cease, and

the property belong to her, but that in case of her failure to pay such rents the plaintiffs might, without demand or notice, and without rendering themselves liable to any action of trespass or tort, or for the refunding of the sums received by them, enter any house or place where the property might be and take possession of and remove it. Mrs. Bryant, after the property was delivered to her, removed with it to various places, with the consent of the plaintiffs, and on September 22, 1886, executed a mortgage thereon to one Stetson to secure the payment of three hundred dollars. In August, 1890, the mortgagee took possession of the property through his agent, and placed it in the possession of the defendant at his auction rooms, and the defendant, as auctioneer, made such sale, paying the proceeds to the mortgagee in ignorance of the claims of plaintiffs. Mrs. Bryant at various times made payments, amounting in the aggregate to six hundred and sixteen dollars, but at the time of the sale made by defendant she was in default with respect to the other payments.

R. R. Gilman and W. H. Mitchell, for the defendant.

W. F. Kimball, for the plaintiffs.

HOLMES, J. The defendant is an auctioneer, who has sold personal property belonging to the plaintiffs. Therefore he is liable for a conversion unless he can show some other excuse or justification than his good faith and his ignorance of the plaintiff's title: *Coles v. Clark*, 3 Cush. 399; *Hoffman v. Carow*, 22 Wend. 285; *Cochrane v. Rymill*, 40 L. T., N. S., 744; *Hollans v. Fowler*, L. R. 7 H. L. 757. The mere fact that the plaintiffs made a bailment to Mrs. Bryant, and that she mortgaged the goods to Stetson, who took without notice and for value, and directed the present sale, is not such a justification. The passage to the contrary in the note to *Wilbraham v. Snow*, 2 Wms. Saund. 47a, cited in *Vincent v. Cornell*, 13 Pick. 294, 296, 23 Am. Dec. 683, is a misunderstanding of the Year Books on a matter as to which their doctrine no longer is the law, as every one knows, and as may be seen from the later additional note: See *Hirschorn v. Canney*, 98 Mass. 149, 150, 152; *Coggill v. Hartford etc. R. R. Co.*, 3 Gray, 545. The explanation of the early law is a matter of antiquarianism, which would be out of place here.

If at the time of the sale Mrs. Bryant had had a right of possession, to the exclusion of the plaintiffs, which was not terminated by the sale, the plaintiffs could not have main-

tained trover; and this principle is applied against a seller upon a conditional sale, so called, where the plaintiff reserves the title, if the time for payment has not arrived at the time of the alleged conversion: *Newhall v. Kingsbury*, 131 Mass. 445; *Day v. Bassett*, 102 Mass. 445; *Fairbank v. Phelps*, 22 Pick. 535; *Vincent v. Cornell*, 13 Pick. 294; 23 Am. Dec. 683.

But in the case at bar not only had Mrs. Bryant expressly agreed not to sell or mortgage the goods, but at the time of the mortgage to Stetson and of the sale by the defendant she was in default for the so-called rent, and by the words of her agreement the plaintiffs had an immediate right of possession without demand or notice.

The plaintiffs have not contributed to the defendant's mistake, as in *Hills v. Snell*, 104 Mass. 173; 6 Am. Rep. 216. There the plaintiffs, who were warehousemen, not owners of the goods in question, made the mistake of delivering the wrong man's flour to one who sold to the defendant, and it was held that they could not maintain trover after he had used it in good faith. It is suggested that the plaintiffs had constructive notice of the mortgage, and therefore should be deemed to have waived their rights. We do not see why, but it is enough to say that the plaintiffs had not the constructive notice supposed. Recording the mortgage did not affect them: *George v. Wood*, 9 Allen, 80, 83; 85 Am. Dec. 741; *Western Union Tel. Co. v. Caldwell*, 141 Mass. 489, 493; *Bates v. Norcross*, 14 Pick. 224, 231.

Judgment for plaintiffs. —

AUCTIONS—LIABILITY OF AUCTIONEERS: See extended note to *Thomas v. Kerr*, 96 Am. Dec. 264. An auctioneer who sells stolen property is liable for its conversion to the same extent as any other merchant: *Rogers v. Huie*, 1 Cal. 429; 54 Am. Dec. 300, and note. But an auctioneer who received mortgaged chattels from the mortgagor and sold them is not liable to the mortgagee for a conversion, although the mortgagor acted fraudulently. The registration of the mortgage in such a case is not under the decisions in Tennessee notice to the auctioneer, where he does not claim any interest therein nor any lien thereon: *Frizzell v. Rundle*, 88 Tenn. 396; 17 Am. St. Rep. 908.

CONDITIONAL SALES—RIGHTS OF PURCHASERS FROM VENDER.—A sale and delivery of goods upon condition that title shall not pass until the payment of the price, vests in the vendee no title which he can pass to a purchaser in good faith, and for a valuable consideration: *Dunbar v. Rawles*, 28 Ind. 225; 92 Am. Dec. 311, and note; *Burbank v. Crooker*, 7 Gray, 158; 66 Am. Dec. 470, and note. See, also, the notes to the following cases: *Pratt v. Burana*, 22 Am. St. Rep. 705; and *Velsian v. Lewis*, 3 Am. St. Rep. 198. A written agreement in the form of a lease, which by its essential terms appears to be a conditional sale of personal property, will be held as such: *Gress v. Jordan*, 83 Me. 380; *Quinn v. Parke etc. Machinery Co.*, 5 Wash. 276.

CLARK v. PATTERSON.

[158 MASSACHUSETTS, 888.]

HUSBAND AND WIFE.—IF A WIFE PLACES IN HER HUSBAND'S HANDS MONEY which is her separate property, the presumption is that he receives it as his own, in the absence of any evidence that he received it in trust for her. Hence if she loans her husband a bond, payable to bearer, and receives from him, or from a firm of which he is a member, a promissory note for the amount of the bond, there is nothing to indicate that he received it in trust for her, or that he is not at liberty to use it as his own.

PARTNERSHIP.—A NOTE SIGNED BY ONE PARTNER AND INDORSED BY THE OTHER is not an undertaking of the firm, and in case of its insolvency is not payable out of its assets.

PARTNERSHIP.—A PROMISSORY NOTE GIVEN BY A PARTNERSHIP TO THE WIFE OF ONE OF ITS MEMBERS is void, and equity will not interfere for her relief.

L. M. Child, for the plaintiff Mary E. Clark.

A. F. Means and J. Lowell, for Patterson and Condit.

C. L. Huntress, for Sughrue.

LATHROP, J. The first case is a bill in equity against John B. Patterson, Michael J. Sughrue, Stephen G. Condit, and the Broadway National Bank. The case was heard on the merits in the superior court, and a decree was entered dismissing the bill. From this decree the plaintiff appealed; and the case comes before us on the pleadings and a report of the evidence taken in the court below. Most of the facts of the case are not in dispute, while as to others there is a controversy. We find them to be as follows:

In May, 1890, Linus E. Clark, the husband of the plaintiff, entered into partnership with the defendant Patterson. By the terms of the articles of copartnership, Clark agreed to contribute to the partnership the sum of one thousand dollars in cash. Clark had no money, but said to Patterson that he had a bond, on which he could realize the money. The bond in question was for the sum of one thousand dollars, and was issued by a water company, and was payable to bearer. It belonged to the plaintiff, and she lent this bond to her husband, and took from him an instrument in writing of the following tenor:

"\$1,000.

Boston, May 5, 1890.

"For value received, pay to the order of Mary E. Clark, one thousand dollars. Value received, and charge the same to account of Linus E. Clark.

"To Mary E. Clark."

This instrument was indorsed in blank by the defendant Patterson, by writing his own name upon it. With this bond as collateral security, the defendant bank lent the firm of Patterson and Clark the sum of one thousand dollars, payable on demand, and took the firm note therefor.

On August 5, 1890, the plaintiff lent her husband a coupon bond of another water company, payable to bearer, for one thousand dollars. She received therefor from her husband the promissory note of the firm of Patterson and Clark, for the sum of one thousand dollars, payable to her order, on demand. With this bond as collateral security the firm of Patterson and Clark borrowed of the defendant bank the sum of eight hundred dollars, and gave its promissory note therefor. The bank had no notice of the plaintiff's interest in either bond. Some time after the latter transaction with the bank the firm of Patterson and Clark failed, and, on September 29, 1890, executed an instrument of assignment to the defendant Sughrue of all their assets, in trust for the creditors of the firm who should become parties thereto. This instrument authorized the assignee, among other things, "to sell and dispose of all the trust property as by him deemed wise, and to collect or sell choses in action, using a reasonable discretion as to the times and modes of selling and disposing thereof, for cash or on credit, at public or private sale."

When Patterson and Clark failed, the plaintiff made claim for the amount of the two instruments delivered to her by her husband, and wished to assent to the instrument of assignment as a creditor, and did what she could to become a party thereto. She was told by the assignee that by the laws of this commonwealth such a claim was not authorized, and was advised to employ counsel. She did employ counsel, who advised her that she had no claim on the assets of the firm. On October 10, 1890, with the advice and consent of her counsel, she signed the following paper:

"It is agreed that the bonds held by the Broadway National Bank may be sold by said bank at private sale, and the proceeds, after payment of the bank's claim, may be held by the bank and paid to whomsoever is entitled thereto as soon as same may be determined or settled. This agreement is understood to be without prejudice to the rights or titles of either party."

The bank did not become a party to the assignment; and, on November 29, 1890, sold the bonds, under a power of sale

contained in the notes, for about eighteen hundred dollars. It does not appear that there was any surplus after satisfying the claim of the bank.

On October 25, 1890, the defendant Condit, who was the largest creditor of the firm, bought of the assignee all the assets of the partnership, and agreed in writing "to compromise, assume, or pay all claims and demands against the partnership of Patterson and Clark." At the time he entered into this agreement, he was informed by the assignee that all the claims he had to settle were the claims against the firm for merchandise, and that he had nothing to do with the bonds held by the bank, or with the claims of the present plaintiff. The bill in the second case is brought by Condit against Patterson, Sughrue, Clark, and his wife, and the Broadway National Bank. It proceeds on the ground that, if the court shall hold that the plaintiff is bound to Mrs. Clark, by reason of the agreement entered into between the plaintiff and Sughrue, the agreement was entered into through a mistake of law and fact. The prayer of the bill is that, on his delivering up the assets received by him, the agreement may be canceled. This bill was dismissed by the superior court, on the ground that the plaintiff stood in no need of equitable relief, as the bill in the first case had been dismissed. From this decree the plaintiff appealed to this court, in order that the whole matter might be before the court.

We proceed to consider the claims made by the plaintiff in the first case. She contends that she never parted with her property in the bonds; that they were merely lent by her to her husband; and that a trust was imposed upon the bonds in her favor. It was held in *Jacobs v. Hesler*, 113 Mass. 157, that if a wife places in her husband's hands money that is her separate property, the presumption, in the absence of evidence that he receives it in trust for her, is that he can use it as his own: See also *Brown v. Wood*, 121 Mass. 137. We find nothing in the case at bar to warrant us in deciding that the bonds were received by the husband in trust for the plaintiff, or anything to rebut the presumption that he was at liberty to use the bonds as he pleased. Nor do we find any evidence of fraud practised upon her: See *Thacher v. Churchill*, 118 Mass. 108.

The next contention of the plaintiff is that, if she has no property in the bonds, she has a claim against the partnership on the two instruments given her at the times the bonds

were handed over by her. The first instrument, whether it be styled a draft or a note, was not an undertaking by the firm. It was at most an undertaking by one member of the firm indorsed by the other; and, if provable at all, would be only against the separate assets of the signers. There were no separate assets in this case; and the plaintiff can have no claim against the firm assets on account of this instrument.

As to the second note, it was void as between the original parties, being given to a wife by a partnership of which her husband was a member: *Kenworthy v. Sawyer*, 125 Mass. 28, and cases cited. Nor does equity afford relief in such a case: *Fowle v. Torrey*, 135 Mass. 87. See also *Kneil v. Eggleston*, 140 Mass. 202. It was, moreover, decided in *Woodward v. Spurr*, 141 Mass. 283, that a wife was not entitled to prove, against the estate of her husband in insolvency, a claim for money lent by her to him from her separate estate, and used by him in his business, and for which she held his promissory note, notwithstanding the statutes of 1884, chapter 293, providing for the proof of equitable liabilities against insolvent estates.

It follows from these cases that the plaintiff was not entitled to prove against the assets of the partnership, and that the decree below, dismissing the bill, was correct.

HUSBAND AND WIFE—GIFT FROM WIFE TO HUSBAND, WHEN PRESUMED. It is presumed that when a husband receives money from his wife and uses it in his business that she intended to give it to him, and not to loan it to him: *Beecher v. Wilson*, 84 Va. 813; 10 Am. St. Rep. 883, and note; *Estate of Hauer*, 140 Pa. St. 420; 23 Am. St. Rep. 245, and note; *McLure v. Lancaster*, 24 S. C. 273; 58 Am. Rep. 259, and note; *Zinn v. Law*, 32 W. Va. 447. Where a husband has received money which belonged to his wife, he becomes her debtor, and no affirmative proof by the wife that he received it as a loan and not as a gift is necessary: *Estate of Wormley*, 137 Pa. St. 101. There is no presumption that the mere handing over of a sum of money by a wife to her husband is a loan, thus creating the relation of debtor and creditor between them: *Bromwell v. Bromwell*, 139 Ill. 424.

PARTNERSHIP—A married woman cannot sustain an action against a partnership, of which her husband is a member, to recover compensation for her services: *Edwards v. Stevens*, 3 Allen, 315.

SEARS v. CHAPMAN.

[155 MASSACHUSETTS, 400.]

CHARITABLE TRUST.—A TRUST FOR EDUCATIONAL PURPOSES is a good charitable trust, whether the benefits of the gift are confined to a particular locality or not.

CHARITABLE TRUST.—A devise and bequest of the testator's property for the benefit of the inhabitants of East Dennis and vicinity, for educational purposes, one-third of the property to be appropriated for a building to be located on Quivet Neck in East Dennis, and the other two-thirds to be for the support of such institution, and the whole to be under the exclusive control of the inhabitants of Quivet Neck, is a good gift to charity.

CHARITABLE GIFTS.—GIFT FOR A SPECIFIC CHARITABLE PURPOSE WILL NOT FALL FOR WANT OF A TRUSTEE.

G. C. Travis, first assistant attorney-general, for the commonwealth.

G. A. King, for the heirs at law and the next of kin.

HOLMES, J. This is a bill for instructions whether the following clause in the will of Jacob Sears constitutes a good gift to charity: "After the said Olive F. Sears is no longer my widow, either by death or otherwise, I give and bequeath all that may then remain of my property for the benefit of the inhabitants of East Dennis and vicinity for educational purposes. One-third part of said property to be appropriated for a building and appurtenances, which shall be located on Quivet Neck in East Dennis, and the other two-thirds to be a fund for the support of said institution, the interest of said fund to be so appropriated. The whole to be under the exclusive control of the inhabitants of Quivet Neck."

There is no doubt that a trust for educational purposes is a good charitable trust: *Hadley v. Hopkins Academy*, 14 Pick. 240, 253; *Boxford Religious Society v. Harriman*, 125 Mass. 321, 327; *Davis v. Barnstable*, 154 Mass. 224; *Whicker v. Hume*, 7 H. L. Cas. 124; *Russell v. Allen*, 107 U. S. 163, 172. It is good where there is no limit of space expressed, and it is none the less so when the benefit of the gift is confined in terms, as it must be in fact, to a particular locality: *Lowell, appellant*, 22 Pick. 215; *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522. It is equally good when the limit, although real, is not geometrically exact, as in this case, "East Dennis and vicinity": *Attorney-General v. Gladstone*, 13 Sim. 7, 11; *Hill v. Burns*, 2 Wils. & S. 80, 90, 91; *Miller v. Rowan*, 5 Clark & F.

99, 110; *Wallace v. Attorney-General*, 33 Beav. 384; *Saltonstall v. Sanders*, 11 Allen, 446, 467. As the testator's plan is to carry out the purpose of his gift by means of a building, probably the convenience of those concerned will draw the line without the help of the court, unless the fund is insufficient for the testator's scheme.

It is argued on behalf of the heirs and next of kin that the provision, "the whole to be under the exclusive control of the inhabitants of Quivet Neck," is the consideration and condition of the gift within the principle of *Bullard v. Shirley*, 153 Mass. 559. It is assumed that this must fail, and therefore it is said the gift fails. We do not think that we can make it plainer than it is upon the first reading of the clause, that such control is not of the essence of the gift, but is only an administrative detail. Moreover, on the facts before us, although probably a scheme will have to be framed, we cannot assume that it is any more impossible for the inhabitants of Quivet Neck to control the administration of the fund than it would be if they were a town: *Drury v. Natick*, 10 Allen, 169, 182; *Cary Library v. Bliss*, 151 Mass. 364. In *Baylis v. Attorney-General*, 2 Atk. 239, where money was left "to the ward of Bread street, according to Mr. — his will," Lord Hardwick suggested a decree that the money, "from time to time, be disposed of in such charities as the alderman for the time being and the principal inhabitants shall think the most beneficial to the ward."

It is settled by a line of decisions in this commonwealth that a gift like the present, for a specified charitable purpose, will not fail for want of a trustee. The doubts which have been expressed on this point (*Jackson v. Phillips*, 14 Allen, 539, 576, and *Minot v. Baker*, 147 Mass. 348, 353, 9 Am. St. Rep. 713) must be confined to "gifts to charity generally, with no uses specified, no trust interposed, and either no provision made for an appointment or the power of appointment delegated to particular persons who die without exercising it": *Jackson v. Phillips*, 14 Allen, 539. See *Missionary Society of Methodist Episcopal Church v. Chapman*, 128 Mass. 265, 268, and cases cited. The statement in Boyle on Charities, 213, is that "to give jurisdiction to the court when the selection of objects has been left undetermined by the testator, it seems essential that trustees should be interposed for performance of the office, or at least that an intention should have been evinced by the testator to commit the disposal of his property

to some one." In the present case even the English criteria of jurisdiction are satisfied.

Decree accordingly.

CHARITABLE TRUSTS FOR EDUCATIONAL PURPOSES are held valid in the following line of cases: *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644, and note; *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475, and note; *Mannix v. Purcell*, 46 Ohio St. 102; 15 Am. St. Rep. 562; note to *George v. Brad-dock*, 14 Am. St. Rep. 763; *Davis v. Barnstable*, 154 Mass. 224; *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565. See notes to the following cases in which the validity of charitable trusts is discussed: *Baptist Church v. Shively*, 1 Am. St. Rep. 415; *Howe v. Wilson*, 60 Am. Rep. 230; *Rhymer's Appeal*, 39 Am. Rep. 740; and *Owens v. Missionary Society*, 67 Am. Dec. 184.

CHARITABLE TRUSTS WILL NOT BE ALLOWED TO FAIL FOR WANT OF A TRUSTEE: *McGirr v. Aaron*, 1 Penr. & W. 49; 21 Am. Dec. 361, and note, *Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154; *Fraser v. St. Luke's Church*, 141 Pa. St. 256; *Seda v. Huble*, 75 Iowa, 429; 9 Am. St. Rep. 495; note to *Minot v. Baker*, 9 Am. St. Rep. 721. See also *Pearson v. Concord R. R. Corp.*, 62 N. H. 537; 13 Am. St. Rep. 590.

HORGAN v. PACIFIC MILLS.

[158 MASSACHUSETTS, 402.]

PARENT AND CHILD.—A WIDOWED MOTHER with whom a minor child lives, and by whom it is supported, and for whom the child works as a member of the family, is entitled to recover for the loss of services of the child, and for labor performed and for expenses reasonably incurred in its care, so far as they are the consequences of an injury to the child negligently caused by the defendant.

J. P. Sweeney, for the plaintiff.

C. U. Bell, for the defendant.

FIELD, C. J. The plaintiff's daughter when injured was eleven years old, and it appears that she, with her sisters, one older and two younger than herself, lived with their mother, who was a widow, as members of one family, and that the children were dependent for support on the mother, and rendered some service to her "in work about the house and in tending a small shop which was the front room of the tenement in which they lived." In consequence of the injury the plaintiff suffered loss of her daughter's services, and was put to expense in providing medical attendance for her, and to labor and trouble in nursing and taking care of her. The auditor's report has been made an agreed statement of facts, and the exact finding of the auditor on the question of dam-

ages is as follows: "By reason of her daughter's injuries the plaintiff incurred an expense of \$10 for help in work about the house while the plaintiff was taking care of her daughter, and rendered personal service in nursing and caring for her daughter which was fairly worth \$50, and paid for medical attendance and treatment of her daughter on account of said injuries \$36, and for expenses properly incurred in going to the Massachusetts General Hospital the sum of \$11.25, and for prescriptions, medicines, etc., the sum of \$20, and by reason of said injury the value of her daughter's services to her was diminished \$100; and I find that all said expenses were properly incurred by the plaintiff; who was without means of support other than her own exertions, without any agreement between her and her daughter for repayment thereof, unless such agreement is to be implied by law from the facts herein reported. And that the daughter at the time said expenses were incurred had no property or thing of value, excepting a claim against this defendant for damages suffered by reason of their said negligence, and that this claim was not settled or paid until October 26, 1885, which was after all said expenses were incurred, so that at the time said expenses were incurred the daughter was actually dependent upon the plaintiff for support and care." These sums amount to \$227.25, which the auditor found the plaintiff was entitled to recover, unless the value of the loss of services occurring after the date of the settlement of the daughter's suit should be deducted, which he estimated at \$25.

It appears that the daughter brought suit against this defendant for the injury, and that the suit was settled by the payment of \$2,800, which the plaintiff in the present action received, as guardian of her daughter, having been appointed guardian on September 21, 1885. It is agreed that in this suit by the daughter no claim was made for expenses or loss of services.

The tendency of modern decisions is to give to a widow left with minor children, who keeps the family together and supports herself and them, with the aid of their services, very much the same control over them and their earnings during their minority, and to impose on her to the extent of her ability much the same civil responsibility for their education and maintenance, as are given to and imposed on a father. We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother,

and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child negligently caused by the defendant: *Dedham v. Natick*, 16 Mass. 135; *Hammond v. Corbett*, 50 N. H. 501; 9 Am. Rep. 288; *Matthewson v. Perry*, 37 Conn. 435; 9 Am. Rep. 839. See *Dumain v. Gwynne*, 10 Allen, 270; *Camerlin v. Palmer Co.*, 10 Allen, 539; *Baldwin v. Foster*, 138 Mass. 449; *Gleason v. Boston*, 144 Mass. 25; *Connell v. Putnam*, 58 N. H. 534; *Whitaker v. Warren*, 60 N. H. 20; 49 Am. Rep. 802; *County Commrs. v. Hamilton*, 60 Md. 340; 45 Am. Rep. 739; *Natchez etc. R. R. Co. v. Cook*, 63 Miss. 88. Of course there should not be a double recovery, but if the expenses are not incurred on the credit of the child, but on that of the mother, and if the child, while living with the mother, is not entitled to its own earnings, so that the loss of service is not the child's loss but the mother's, these items of damage should not be included in the damages recovered by the child, but in those recovered by the mother: See *McCarthy v. Guild*, 12 Met. 291; *Dennis v. Clark*, 2 Cush. 847; 48 Am. Dec. 671; *Wilton v. Middlesex R. R. Co.*, 125 Mass. 130. In the case of a girl eleven years old, whose father is dead and whose mother remains a widow, and who has no property and no guardian, it is wise policy to give the control of her to her mother, and to impose on the mother the ordinary rights and duties of a parent, unless it has been determined otherwise by some tribunal having jurisdiction over the relation of parent and child.

The finding of the court seems to be for the sum found by the auditor, with interest from the date of the writ. This, we think, is correct. It does not appear from the papers that judgment has been entered on this finding, but we assume that this has been done, as the defendant appeals. The entry should be judgment on the finding affirmed.

PARENT AND CHILD—DAMAGES TO PARENT FOR NEGLIGENT INJURY TO CHILD.—In an action by a parent for damages to a minor child caused by the defendant's negligence, the parent is entitled to recover the value of the services of the child while incapacitated, and the reasonable expenses necessarily incurred in the effort to restore the child to health: *Barnes v. Keene*, 132 N. Y. 13; *Rogers v. Smith*, 17 Ind. 323; 79 Am. Dec. 483, and note; *County Commissioners v. Hamilton*, 60 Md. 340; 45 Am. Rep. 739; *Whittaker v. Warren*, 60 N. H. 20; 49 Am. Rep. 802: See extended note to

Carey v. Berkshire R. R. Co., 48 Am. Dec. 622. An action for damages for negligent injury to a minor child may be maintained by a parent though the child is too young to render any service, if such parent has been put to trouble and expense in the care and cure of the child: *Dennis v. Clark*, 2 Cash. 347; 48 Am. Dec. 671.

KULLBERG v. O'DONNELL.

[158 MASSACHUSETTS, 405.]

JURY TRIAL.—THAT AN INSTRUCTION WAS GIVEN TO THE JURY IN THE ABSENCE OF COUNSEL is not a cause for a new trial, if it is given in open court after the cause had been submitted to the jury. It is the duty of the parties and their counsel to be present in court while it is open, after the trial of the action has been begun until it is concluded, and the presiding judge cannot be prevented from giving a further instruction to the jury because one or both of the parties or their counsel have absented themselves from the court while in session and while the jury are deliberating upon the case.

J. W. Low, for the plaintiff.

T. Riley, for the defendant.

FIELD, C. J. The presiding justice sent for the jury after the case had been committed to them, and they were brought into the courtroom while the court was in session, and in open court the justice further instructed them "in the absence of counsel on both sides," after which the jury returned a verdict for the defendant. The plaintiff's counsel contends, as matter of law, that he is entitled to a new trial, because the jury were thus instructed in his absence. In *Sargent v. Roberts*, 1 Pick. 337, 342, 11 Am. Dec. 185, it was said: "No communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in presence of the counsel in the cause." In *Commonwealth v. Roby*, 12 Pick. 496, 518, it was said that the verdict was set aside in *Sargent v. Roberts*, 1 Pick. 337, 342, 11 Am. Dec. 185, "on the ground that the practice then prevailing was improper, and that it was important that all instructions to the jury should be given in open court." In *Merrill v. Nary*, 10 Allen, 416, 417, it was said: "The only regular and safe mode of conducting trials is, for the court to instruct the jury on all material points before they retire to deliberate upon their verdict, and, if they have occasion for further information, they should return into court and state the questions on which they wish for further advice, and receive in open court such directions as

may seem to the judge material and necessary": See *Read v. Cambridge*, 124 Mass. 567; 26 Am. Rep. 690. It is plain that the point decided is, that all instructions to the jury must be in open court. It is the duty of the parties or their counsel to be present in court while it is open, after the trial of an action has been begun until it is concluded, and the presiding justice cannot be prevented from giving further instructions to the jury because one or both of the parties or their counsel choose to absent themselves from the court while in session, and while the jury are deliberating upon the case. It may be a convenient practice to send for the counsel if they are near the courthouse, in order that they may hear the instructions given and take exceptions if they see fit, but this is not required as matter of law, and the circumstances may be such as to render it impracticable.

Exceptions overruled. —

JURY TRIAL—INSTRUCTIONS IN ABSENCE OF COUNSEL.—Where the jury after retiring are brought into open court and receive further instructions in the absence of a party and his counsel, there is no reversible error: *Chapman v. Chicago etc. Ry. Co.*, 26 Wis. 295; 7 Am. Rep. 81; *Preston v. Bowser*, 13 Ohio St. 1; 82 Am. Dec. 430. In the latter case the absent party and his counsel were loudly called at the courtroom door. It is a settled practice in New Hampshire that upon receiving a written request from the jury the court may send them written instructions in the absence of counsel; such request and instructions must be filed with the verdict so that they may be seen by the counsel: *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323; but in *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387, it was held that the charging of the jury in the absence of counsel is error, though the instructions in the opinion of the judge do not vary from those already given.

FIRST CONGREGATIONAL CHURCH v. HOLYOKE MUTUAL FIRE INSURANCE COMPANY.

[158 MASSACHUSETTS, 475.]

INSURANCE—INCREASE OF RISK FOR WHICH THE ASSURED IS RESPONSIBLE.

If the property insured is a church and it is being repainted under the direction of the board of trustees by painters employed by them, and they have knowledge of the means used by such painters, and those means amount to an increase of the risk, such increase must be regarded as taking place with the knowledge and consent of the assured and as being an alteration of the circumstances affecting the risk.

INSURANCE—INCREASE OF RISK, DURATION OF.—A condition in a policy of insurance that it shall become void if the situation or circumstances affecting the risk shall be so altered as to cause an increase thereof, is

not ordinarily violated by a mere temporary change increasing the risk, but a change existing continuously during the working hours of nearly a month is not temporary, and is continued sufficiently long to be deemed a change in the situation and circumstances affecting the risk.

INSURANCE—INCREASE OF RISK.—THE USE OF A NAPHTHA TORCH TO BURN OFF THE OLD PAINT from a wooden building for the purpose of repainting it, when such use continues every working day for nearly a month, violates a condition in a policy of insurance providing that it shall become void if the situation and circumstances of the risk shall be so altered as to cause an increase thereof.

INSURANCE.—CONDITION IN A POLICY AGAINST KEEPING OR USING NAPHTHA by the assured on the premises implies the use of the premises as a place of deposit for the prohibited article for a considerable time. But if naphtha is used in a torch for nearly a month for the purpose of burning off old paint, though the naphtha is not on or in the premises, but is used in a liquid form a few inches outside the wall, then this is a prohibited use of naphtha on the premises within the meaning of the policy.

INSURANCE—INCREASE OF RISK FOR THE PURPOSE OF MAKING REPAIRS.—A condition in a policy of insurance against any change in the situation and circumstances of property affecting the risk is not intended to prevent the making of necessary repairs and the use of such means as are reasonably necessary for that purpose. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in proper condition by making repairs upon it.

INSURANCE—INCREASE OF RISK WHEN A QUESTION FOR THE JURY.—If a policy of insurance against fire contains a condition against increasing the risk and against the use of naphtha on the premises, and such premises being in need of repainting, a naphtha torch is used daily for a period of a month for the purpose of burning off old paint, whereby the risk insured against is increased, the question to be submitted to the jury is whether the use of the naphtha, at the time and in the manner in which it was used, was reasonable and proper in the repair of the building, having reference to the danger from fire as well as other considerations. If the use of the naphtha torch was, under the circumstances and at the time and in the manner in which it was used, an unreasonable use the policy is avoided thereby.

INSURANCE—INCREASE OF RISK—EVIDENCE.—As bearing on the question whether the use of a naphtha torch to burn off old paint would increase a risk, evidence of experts is admissible to show that the rate of premium for fire insurance is greater where such a torch is to be used for such a purpose than if there is to be no such use.

INSURANCE.—EVIDENCE OF EXPERT CONSISTING of his opinion in reference to the actual effect of the use of a naphtha torch in reference to the danger from fire is incompetent.

INSURANCE—INCREASE OF RISK.—EVIDENCE OF EXPERTS in regard to proper or usual way of removing old paint from a building for the purpose of repainting it is admissible.

PRACTICE—EVIDENCE.—It is largely within the discretion of the court to determine how far it will go in the trial of collateral issues. Hence an appellate court will not review the discretion of a trial court in excluding evidence tending to show that a building consumed by fire communicated by a naphtha torch in use for burning off old paint had caught fire at some previous day from the use of the same torch.

A. Hemenway, for the defendants.

W. A. Gaston and L. S. Dabney, for the plaintiff.

KNOWLTON, J. The policies of insurance sued on in these six cases are all alike in containing provisions which are relied on in defense, and which are as follows: "This policy shall be void if . . . without the assent in writing or in print of the company . . . the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk; or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting," etc. The property insured was a church edifice, built of wood, not clapboarded, but sheathed horizontally with grooved and tongued sheathing, closely matched together, and painted and sanded on the outside. The paint had peeled and curled, and at the time of the fire the plaintiff was repainting the building. Three trustees had "the control and care of all the real estate belonging to the church," and were authorized to provide for its insurance and repairs. They arranged with one Gilson, a painter, to paint the outside of the building by the day, at the rate of three dollars per day for himself, and two dollars and seventy-five cents per day for his men, the trustees furnishing the paint stock and he furnishing his own brushes, ladders, and other tools of trade. It was also arranged that he was to burn off the old paint with a torch or some such implement preparatory to repainting. He procured for the purpose a naphtha torch, so made as to hold a quart or more of naphtha, with a handle at one side of the receptacle, and a tube extending out on the opposite side, through which a flame could be emitted, produced by the gas from the naphtha and compressed air. It could be made to send this flame out in a straight line about two feet, and when in use it made a noise "similar to a steam-engine." The flame could be regulated by a thumb-screw so as to extend not more than six or eight inches beyond the end of the tube, and the torch was used by holding it in the left hand and passing it along, so that the flame from the tube would blister or burn the paint, which could then easily be scraped off. The evidence tended to show that the trustees knew that Gilson was to burn off the paint.

and left it to him to determine exactly in what way he would do it. One or more of them saw the torch which was used before he began to use it, and they repeatedly saw him using it before the fire. When the work had been going on about four weeks, the torch, according to the testimony, having been used daily during all the working days, the building caught fire on the edge of a board where there was crack and where the torch had just been used, and was entirely consumed. This was on the sixteenth day of July, 1890, and there was evidence that the weather was hot and that the boards were very dry. There was also evidence that, as a protection against fire, a pail of water was kept on hand while the work was going on. The evidence tended strongly to show that the danger of a conflagration was greatly increased by the use of a naphtha torch on the dry, inflammable, soft pine boards, with their shrunken joints.

If the risk was increased by the use of the torch, it seems, on the undisputed facts, that it was by the agency and with the knowledge and consent of the assured, for the officers represented the plaintiff in the management of the property, and saw the torch in use, and they authorized the use of it before the work was begun: *National Security Bank v. Cushman*, 121 Mass. 490. Gilson was their agent, acting in the exercise of his discretion and with full authority in procuring and using the naphtha, and on the uncontradicted evidence the use of naphtha by him was a use of it by the insured, within the meaning of the provision quoted from the policies. Was a change of this kind increasing the risk with the knowledge, agency, and consent of the insured an alteration of "the situation or circumstances affecting the risk," within the meaning of those words in the policies? Those words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void under this provision. But this change had existed continuously during the working hours of every day for nearly a month, and the work was not nearly done when it was interrupted by the fire. We are of opinion that the change of the condition was sufficiently long continued to be deemed a change in "the situation or circumstances affecting the risk." In the case of *Lyman v. State etc. Ins. Co.*, 14 Allen, 329, it was held that an alteration of a building which increased the risk for three weeks was enough to render the policy void under a similar clause.

We find no evidence that naphtha was kept on the premises. The word "kept," as used in the policy, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time: See *Williams v. New England etc. Ins. Co.*, 31 Me. 219; *O'Niel v. Buffalo F. Ins. Co.*, 3 N. Y. 122; *Williams v. Fireman's Fund Ins. Co.*, 54 N. Y. 569; 13 Am. Rep. 620; *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; 37 Am. Rep. 647; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368.

For nearly four weeks naphtha was used within a few inches of the outer wall of the building to produce the flame which was brought in contact with the building. It would be a narrow and unreasonable construction of the policies in reference to the purposes for which the words were inserted to say that the use of naphtha was not "on the premises" because while in liquid form it was a few inches outside of the wall, when it was made to produce an effect directly on the premises by burning it in the form of gas and directing it against the building.

On the undisputed facts as stated in the bill of exceptions the only ground on which the plaintiff could fairly ask to present a question to the jury is upon its contention that the use of the naphtha and the change in conditions affecting the risk occurred through making ordinary repairs in a reasonable and proper way, and that in the provisions quoted from the policies there is an implied exception of what is done in making ordinary repairs. It is generally held that such provisions are not intended to prevent the making of necessary repairs and the use of such means as are reasonably required for that purpose: *O'Niel v. Buffalo F. Ins. Co.*, 3 N. Y. 122; *Dobson v. Sotheby, Moody & M.* 90; *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; 11 Am. Rep. 469; *Billings v. Tolland Co. etc. Ins. Co.*, 20 Conn. 139; 50 Am. Dec. 277; *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; 37 Am. Rep. 647; *Williams v. New England etc. Ins. Co.*, 31 Me. 219; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in a proper condition by making repairs upon it. Policies on buildings are often issued for a term of five years or more. The making of ordinary repairs in a reasonable way may sometimes increase the risk more or less while the work is going on, or involve the use of an article whose use in a business carried on in the building

is prohibited by the policy. In the absence of an express stipulation to that effect a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like these we are considering should not be deemed to apply to an increase of risk or to a use of an article necessary for the preservation of the property. We are therefore of opinion that if the use of naphtha at the time and in the manner in which it was used was reasonable and proper in the repair of the building, having reference to the danger of fire as well as to other considerations, it would not render the policies void. But the questions submitted to the jury on the answers to which verdicts were ordered for the plaintiff did not sufficiently present the matters of fact in issue. The only question bearing on the most vital part of the issue was as follows: "Was the method used the method ordinarily pursued to remove the paint on the outside of a building preparatory to scraping it off to repaint it?" The order of verdicts for the plaintiff on an affirmative answer to this question assumed that the removal of the paint from this building was reasonably necessary to the repair of the building. It also assumed that this building, in reference to the danger from moving the flaming torch all over its external surface, was like ordinary buildings. Many buildings are built of brick, and painted on the outer walls. Many others are clapboarded in such a way as to make a very close, tight covering. If this is the method ordinarily pursued when paint is to be removed from the outside of a building, it does not follow that it is ordinarily pursued when the building is covered with soft pine sheathing, tongued and grooved and put on horizontally, and when, at the time of doing the work, the weather is very hot and dry, and the boards shrunken so that in some places there are cracks.

Gilson testified that although he had been a house painter in Rockland twenty-five years, he had never burned off paint from the outside of a building before. The architect who was consulted by the plaintiff in regard to repairs advised removing the old paint by the application of a paint remover, which was a preparation to be applied by a brush or a sponge. The use of naphtha, and the increase of risk by an alteration of the circumstances affecting it, were permitted under the implied exception only when reasonably required for the making of repairs. If it was unreasonable to use naphtha under the circumstances, at the time and in the manner disclosed by the

evidence, the use was not within the exception, and the policies became void. The question for the jury was, whether the defendants, if familiar with the condition of the building, and the methods usually adopted in making repairs, should have contemplated when they issued the policies that the plaintiff corporation would burn off the paint at such a time and in such a way as it did. Was such a use of naphtha a reasonably safe and proper way of making repairs on this building under the circumstances? The questions submitted to the jury were not equivalent to these.

As bearing on the question whether the use of a naphtha torch would increase the risk, the defendants might show, if they could, by an expert in regard to the rates of premium for fire insurance, that the rates on a building whose paint was to be removed from the outside by the use of such a torch would be higher than if there was to be no such use. The relative rates usual for insurance under different circumstances are treated as facts which a jury may consider in determining the degree of the risk: *Webber v. Eastern R. R. Co.*, 2 Met. 147; *Luce v. Dorchester etc. Ins. Co.*, 105 Mass. 297, 301; 7 Am. Rep. 522; *Cornish v. Farm Buildings F. Ins. Co.*, 74 N. Y. 295; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Planters' etc. Ins. Co. v. Rowland*, 66 Md. 236. The other question to the witness, which called for his opinion as an expert as to the actual effect of the use of naphtha in reference to danger from fire, was incompetent: *Lyman v. State etc. Ins. Co.*, 14 Allen, 329.

The testimony of experts in regard to the proper and usual way of removing paint was rightly admitted.

It was within the discretion of the court to exclude the question "Whether or not the sheathing of the church caught fire at any time previous to the day the church was burned by the use of the torch?" It might have caught fire in such a way as would have no tendency to show that the use of the torch was an unreasonable and improper method of making repairs. On the other hand, the circumstances may have been such as to make it a proper fact for the consideration of the jury. It is largely within the discretion of the court to determine how far to go into the trial of collateral issues.

Verdict set aside.

INSURANCE—INCREASE OF RISK—REPAIRS—DURATION.—One brief violation of the terms of a policy of fire insurance for necessary work incidental to the preservation of the property will not be considered a breach of a con-

dition prescribing the use of the premises: *Krug v. German etc. Ins. Co.*, 147 Pa. St. 272; 30 Am. St. Rep. 729, and note; *Franklin etc. Ins. Co. v. Chicago Ins. Co.*, 36 Md. 102; 11 Am. Rep. 469. An act done in an insured building which does not change its nature, although out of the ordinary use thereof, does not vacate the policy unless the acts are fraudulent or grossly careless, leading to the loss: *Billings v. Tolland County etc. Ins. Co.*, 20 Conn. 139; 50 Am. Dec. 277, and note. Under a condition in a policy providing that repairs to be made in and about the insured premises must be at the risk of the party insured, such repairs do not *per se* avoid the contract, but only place upon the insured party the hazard of increasing the liability of the insurer: *Girard etc. Ins. Co. v. Stephenson*, 37 Pa. St. 293; 78 Am. Dec. 423, and note.

INSURANCE—INCREASE OF RISK—USE OF COMBUSTIBLES ON PREMISES.—This question is discussed in the following cases: *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450; 13 Am. St. Rep. 582, and note, with cases collected; *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; 37 Am. Rep. 647, and note; *Williams v. Fireman's etc. Ins. Co.*, 54 N. Y. 569; 13 Am. Rep. 620; *Cox v. Home Ins. Co.*, 44 Cal. 320; 13 Am. Rep. 165.

MOUNT HOPE CEMETERY v. CITY OF BOSTON.

[159 MASSACHUSETTS, 509.]

MUNICIPAL CORPORATIONS—LEGISLATIVE CONTROL OF PROPERTY OF.—Over property which a municipality has acquired for purposes deemed strictly public, that is, which it holds merely as an agency of the state government, for the performance of duties devolving upon it, the legislature may exercise a control to the extent of requiring the municipality, without compensation, to transfer the property to some other agency of the government, appointed to perform similar duties, and to be used for similar purposes, and perhaps for other purposes strictly public in character. This legislative control does not extend to property acquired for special purposes not deemed strictly and exclusively public and political.

MUNICIPAL CORPORATIONS—LEGISLATIVE AUTHORITY TO DIVEST PROPERTY OF IN PUBLIC CEMETERIES.—A statute requiring a city to transfer a cemetery to another corporation is unconstitutional if the property used as a cemetery was purchased and improved by the city, and it had the right to hold the cemetery not only for the burial of poor persons, but with the right to make sales of burial rights to any persons who might wish to purchase them, whether residents or nonresidents.

MUNICIPAL CORPORATIONS.—THE LEGISLATIVE CONTROL OF MUNICIPAL PROPERTY, when it exists, does not extend so far as to enable the legislature to require a transfer without compensation to a private person, or to a private corporation.

CORPORATIONS.—A CORPORATION DOES NOT BECOME A PUBLIC ONE merely by receiving a charter from the legislature, by owing certain duties to the public, or by being subjected to rules and regulations established in the exercise of the police power.

CORPORATION, WHETHER PUBLIC OR PRIVATE.—A corporation whose members are to consist of all persons having burial lots in a specified ceme-

tery who shall notify the clerk of their acceptance of the act creating it, and which is made subject to the provisions of the statutes of the state relating chiefly to private cemetery companies, and which is given the same rights, and subjected to the same duties and liabilities as the municipality by which the cemetery had been owned and managed, is a private corporation.

MANDAMUS to compel the city of Boston and its mayor to transfer Mount Hope Cemetery to the petitioners. Their right to such transfer was based upon a statute enacted in 1889. This statute, after providing for the organization of the corporation in its fourth and fifth sections, provided and declared as follows:

"SEC. 4. Immediately upon the organization of said corporation, said city of Boston shall convey to it, by proper deed, all the lands constituting said cemetery, together with the stock, tools, implements, and other personal property pertaining thereto, or commonly used thereon, and with the right to any unpaid balances remaining due for lots already sold, to be held by said corporation, so far as consistent herewith, for the same uses and purposes, and charged with the same duties, trusts, and liabilities for and subject to which the same are now held by said city; and the said corporation shall thenceforth have the entire charge of said cemetery, and of the care of lots and graves therein; and to that end shall receive from said city the annual income, as it accrues, of the funds now held by said city under the provisions of section seventeen of chapter eighty-two of the public statutes, and apply said income to the preservation and care of the lots entitled to such application; and the said corporation shall have, in respect of said cemetery, all rights, powers and privileges, and be subject to all duties, obligations, and liabilities, now had or sustained by said city in respect thereof, and shall fully indemnify and hold harmless the said city in regard to the same.

"SEC. 5. The said city shall continue to have the right of burial of persons, for whose burial it is now or shall hereafter be bound by law to provide, in that portion of the westerly end of said cemetery bounded and described in section one, and interments of such persons may either be there made by said city, at its own expense, or by said corporation, upon such terms for the cost of preparation and interment as may from time to time be agreed upon between the overseers of the poor of said city and the executive board of said corporation."

The application for the writ of mandate was resisted by the owners of lots in the cemetery who had paid the cemetery therefor.

W. Gaston, J. B. Richardson, and S. W. Creech, Jr., for the petitioners.

T. M. Babson, for the city of Boston.

S. D. Charles, for John Taylor and others.

ALLEN, J. Over property which a city or town has acquired and holds exclusively for purposes deemed strictly public, that is, which the city or town holds merely as an agency of the state government for the performance of the strictly public duties devolved upon it, the legislature may exercise a control to the extent of requiring the city or town, without receiving compensation therefor, to transfer such property to some other agency of the government appointed to perform similar duties, and to be used for similar purposes, or perhaps for other purposes strictly public in their character. Thus much is admitted on behalf of the city, and the doctrine is stated and illustrated in many decisions: *Weymouth etc. Fire District v. County Commrs.*, 108 Mass. 142; *Whitney v. Stow*, 111 Mass. 368; *Rawson v. Spencer*, 113 Mass. 40; *Stone v. Charlestown*, 114 Mass. 214; *Kingman, petitioner*, 153 Mass. 566, 573; *Meriwether v. Garrett*, 102 U. S. 472; *Mayor etc. v. State*, 15 Md. 376; 74 Am. Dec. 572.

By a quite general concurrence of opinion, however, this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain with payment of compensation. This distinction we deem to be well founded, but no exact or full enumeration can be made of the kinds of property which will fall within it, because in different states similar kinds of property may be held under different laws, and with different duties and obligations, so that a kind of property might in one state be held strictly for public uses, while in another state it might not be. But the general doctrine that cities and towns may have a private ownership of property which cannot be wholly controlled by the state government, though the uses of it may be

in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen: *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 115; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 533; *Railroad Co. v. Ellerman*, 105 U. S. 166, 172; *Cannon v. New Orleans*, 20 Wall. 577; *Mayor etc. v. Second Avenue R. R. Co.*, 32 N. Y. 261; *People v. Batchellor*, 53 N. Y. 128; 13 Am. Rep. 480; *People v. O'Brien*, 111 N. Y. 1, 42; 7 Am. St. Rep. 684; *Webb v. Mayor etc.* 64 How. Pr. 10; *Montpelier v. East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748; *Western Saving Fund Soc. v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730; *People v. Detroit*, 28 Mich. 228, 235, 236, 238; 15 Am. Rep. 202; *People v. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 103; *Detroit v. Detroit etc. Plank Road Co.*, 43 Mich. 140; *Thompson v. Moran*, 44 Mich. 602; *Louisville v. University of Louisville*, 15 B. Mon. 642; *Richland v. Lawrence Co.*, 12 Ill. 1; *People v. Mayor, etc.* 51 Ill. 17; 2 Am. Rep. 279; *Grogan v. San Francisco*, 18 Cal. 590; *Hewison v. New Haven*, 37 Conn. 475; 9 Am. Rep. 342. The same conclusion is arrived at, after a full and clear discussion of the subject, in Dillon on Municipal Corporations, 4th ed., secs. 66-68, and notes. See also Cooley on Taxation, 688.

In this commonwealth, the question has not directly arisen in reference to the power of the legislature to compel a transfer of the property of a city or town, but the double character of cities and towns in reference to their duties and liabilities has very often been adverted to. When a city or town acts merely as an agent of the state government in performing duties for the general benefit, it is usually held free from liability to persons who sustain injuries through negligence, except in the case of defective highways, which constitute an exception to the general rule. But in other cases, where an element partly commercial comes in, a liability is usually enforced: *Tindley v. Salem*, 137 Mass. 171, 172; 50 Am. Rep. 289, and cases cited; *Worden v. New Bedford*, 131 Mass. 23; 41 Am. Rep. 185; *Bailey v. Mayor etc.*, 3 Hill, 531; 38 Am. Dec. 669. In such cases, the ultimate question usually is, Did the legislature mean that the city or town, or other creature of statute, should be liable for negligence, or did it not? *Howard v. Worcester*, 153 Mass. 426; 25 Am. St. Rep. 651; *Southampton etc. Bridge Co. v. Southampton*, 8 El. & B. 801, 812; *Cowley v. Mayor etc.*, 6 Hurl. & N. 565, 573; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686, 707, 709, 710, 721. But in deter-

mining this question courts make a discrimination in respect to the character of the duties and of the property which are involved. Nowhere else has this ground of distinction been more often or more strongly insisted on than in Massachusetts. See cases cited in *Tindley v. Salem*, 137 Mass. 171, 174; 50 Am. Rep. 289; *Pratt v. Weymouth*, 147 Mass. 245; 9 Am. St. Rep. 691, *Neff v. Wellesley*, 148 Mass. 487, 493; *Lincoln v. Boston*, 148 Mass. 578; 12 Am. St. Rep. 601; *Curran v. Boston*, 151 Mass. 505, 508; 21 Am. St. Rep. 465. In the recent case of *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, we had occasion to make an analogous discrimination between the general duty which the city of Lowell was under to furnish water in equal terms to all its inhabitants, and the particular undertaking to furnish water for a year to an individual who had paid a year's rates in advance.

In the case before us we have to determine whether the title of the city of Boston to the Mount Hope cemetery is subject to legislative control, and this involves an inquiry to some extent into the usages and laws in this commonwealth relating to burying-grounds, with a view of ascertaining whether, in the ownership of such property, towns have heretofore been regarded or have acted merely as agencies of the state government.

In early times, when land was set apart for a burying-ground, it was sometimes under the care and control of the town or district, and sometimes under that of the parish. It is said in *First Parish in Shrewsbury v. Smith*, 14 Pick. 297, 801: "The fact probably was, that towns, parishes, and proprietors often consisted so nearly of the same individuals that a grant or appropriation of one of these bodies to another was little more than an appropriation by themselves in one capacity to the use of themselves in another"; and in *Lakin v. Ames*, 10 Cush. 198, 218: "Although in early times the establishment, care, and control of burial-grounds, like the support of schools, might have been partly a parochial and partly a municipal duty, yet before the creation of a new parish in the town of Pepperell, in 1831, they were regarded as appertaining rather to towns than to parishes." We cannot find either in the statutes or the history of Massachusetts any clear line of distinction between the duty or usages of towns and of parishes in this respect. Sometimes land was set apart or bought and owned by the town or district for this purpose, and sometimes by the parish. Instances of ancient

ownership by towns, by districts, and by parishes are referred to in *First Parish in Shrewsbury v. Smith*, 14 Pick. 297; *Bachelor v. Wakefield*, 8 Cush. 243; and *Lakin v. Ames*, 10 Cush. 198; and there appears to be no doubt that money for providing, enlarging, and maintaining them was raised by each of these corporate bodies. More than two hundred years ago the town of Boston bought land for burying-grounds, the Chapel, Copp's Hill, and the Granary burying-grounds being the earliest: Shurtleff's Top. & Hist. Description of Boston, 182 et seq.; 1 Memorial History of Boston, 554, 555; 2 Id. 528, 529. In the general legislation of the commonwealth burying-places, whether belonging to towns, districts, parishes, or precincts, were early spoken of in connection with other pieces of land as "appropriated for the general use, ease, or convenience of the community," and provision was made for defining their boundaries and protecting them from encumbrances: Stats. 1786, c. 67, sec. 7, and c. 81, sec. 6, re-enacted in Rev. Stats., c. 24, secs. 61, 63. By statutes of 1828, chapter 141, section 1, the First Parish in Rowley was authorized to assess a tax for the enlargement of its burial-ground, or to purchase a new one, on all polls within the territorial limits of the said parish, and on estates within said limits, for the use and benefit of all the inhabitants living within said limits and their successors forever.

No general statute which in express terms authorizes the expenditure of money for the purchase and care of land for this purpose has been found earlier than statutes of 1828, chapter 107, in which towns, districts, and parishes or religious societies are all put on the same footing. The statute is as follows: "Be it enacted that the inhabitants of each town, district, parish, or religious society within this commonwealth, qualified to vote in town, district, or parish meetings, shall have power, at any meeting called for that purpose, to raise, in the same manner that other town, district, or parish charges may now by law be raised, such sum or sums of money as they shall deem necessary for the purchase of lands for burial-grounds, and for the care and preservation of the same." This, as we believe, was merely giving the express sanction of law to what had long been a prevailing usage. The above statute, when incorporated into the Revised Statutes, was divided, the part relating to towns being contained in Revised Statutes, chapter 15, section 12 (which included districts: Rev. Stats., sec. 2, c. 6, cl. 17),

and that relating to parishes being found in Rev. Stats., c. 20, sec. 18.

The time when exclusive rights of burial in particular lots were first assigned or sold to families or individuals is involved in some obscurity. The power to do this also was probably at first assumed by towns and parishes, and afterwards had the sanction of express legislation. Before the year 1715 private tombs were in use in the Chapel burying-ground, and others were added from time to time in that and the other burying-grounds of Boston: Shurtleff's Top. & Hist. Description of Boston, 186-193, 200-205, 212, 213, 233, 244, 249, 250. These tombs were sometimes built, it would seem, by individuals, and sometimes by the town and sold to individuals. In an investigation before a committee of the city counsel of Boston in 1879 concerning the expediency of prohibiting further interments in the King's Chapel and Granary burying-grounds much information as to the early usages in respect to burials and burial rights was brought out, as shown in city documents of 1879, Nos. 47 and 96, where extracts from the town records are printed. It seems that as early as 1721, and in the succeeding years, the privilege of building a tomb in the Granary burying-ground, and probably in the others also, was usually granted by the town officers to any applicant, without direct compensation for the land, but upon certain prescribed conditions as to making and maintaining the wall, and paying a proportion of the expense of a drain. In 1738 certain tombs appear to have been built for the town, and afterwards disposed of by the selectmen; and in 1807 a tomb was sold for three hundred dollars, and the town assumed control of the tombs whose owners had failed to keep them in repair and were out of reach, and voted to "sell them for the advantage of the town." Tombs so held by individuals were private property, and transferable as such. An instance of such a sale is found referred to in the town records in 1802, and another in 1807. By statutes of 1822, chapter 93, section 8, tombs in use were exempted from attachment and execution, and in the Revised Statutes, chapter 97, section 22, clause 7, this exemption was extended to rights of burial. This exemption was not limited to tombs and rights of burial in private soil, but clearly included rights possessed by individuals in the public or common burying-grounds.

The first private incorporated cemetery company, so far as

ascertained, was the Massachusetts Horticultural Society, which, by statutes of 1831, chapter 69, was authorized to appropriate a part of its land for a rural cemetery or burying-ground; to lay out lots for family and other burying-places; and to grant exclusive rights of burial. This was the origin of the cemetery at Mount Auburn, and a new corporation was formed under statutes of 1835, chapter 96, by the name of the Proprietors of the Cemetery at Mount Auburn, which succeeded to the property, powers, and privileges of the Horticultural Society in respect to the cemetery, with the restriction, however, that all of the proceeds of sales of lots which said proprietors were allowed to retain should be forever devoted and applied to the preservation, improvement, embellishment, and enlargement of the cemetery and garden, and the accidental expenses thereof, and for no other purpose whatsoever. This would effectually cut off all right to declare dividends. After this charters for private cemetery companies were not infrequent: See Stats. 1836, c. 46; 1837, c. 130. By statutes of 1834, chapter 187, section 1, reenacted in Revised Statutes, chapter 130, section 21, a penalty was imposed for making a road, canal, etc., "over, through, in, or upon such part of any inclosure, being the property of a town, parish, religious society, or of private proprietors, as may be used or appropriated for the burial of the dead," without consent first obtained. The first general law authorizing the organization of cemetery companies was statutes of 1841, chapter 114, under which any ten or more persons might organize as a corporation for the purpose of establishing a cemetery, with power to take and hold real and personal estate, which should be applied exclusively to purposes connected with and appropriate to the objects of such organization, and with power to lay out lots and to grant exclusive rights of burial.

The cemeteries owned by towns and cities and parishes were called and considered to be public cemeteries, because they were provided and maintained primarily at the expense of the public. In early times, the parishes were virtually, if not strictly, public corporations. The rights of individuals who were not owners of tombs or lots or burial rights therein must have been subject to such rules and regulations as were established in particular places. An ancient burying-ground, where persons of different families were buried, was easily inferred to be a public burying-ground: *Commonwealth v. Viall*,

2 Allen, 512; *Commonwealth v. Wellington*, 7 Allen, 299. But the use of the word "public" by no means implied that exclusive rights to tombs, lots, and burials did not exist therein, by assignment or purchase. By Statutes of 1848, chapter 79, relating to a "public cemetery" in the city of Roxbury, express authority was given to the city council to grant exclusive rights of burial, the proceeds to be paid into the city treasury, and kept separate and devoted to cemetery purposes. By Statutes of 1855, chapter 44, and 1854, chapter 390, the cities of Cambridge and Worcester respectively were authorized to manage cemeteries, with a right to sell lots, the proceeds to go in each instance into the city treasury. The use of the term "public burial-places," as applied to burial-places owned by cities or towns, in which lots are sold to individuals, still continues: Pub. Stats., c. 82, sec. 17. An example showing that towns were accustomed to sell burial-lots to individuals is found in *Fay v. Milford*, 124 Mass. 79.

Such being the laws and usages of the commonwealth before the time when the city of Boston made its first purchase of the Mount Hope cemetery, the city, by Statutes of 1849, chapter 150, was "authorized to purchase and hold land for a public cemetery in any town in this commonwealth, and to make and establish all suitable rules, orders, and regulations for the interment of the dead therein, to the same extent that the said city of Boston is now authorized to make such rules, orders, and regulations for the interment of the dead within the limits of the said city."

Before any purchase under this statute was made, a general statute was passed which included Boston, Statutes of 1855, chapter 257, section 1, providing that "each city and town in the commonwealth shall provide one or more suitable places for a burial-ground, within which the bodies of persons dying within their respective limits may be interred," and forbidding the use for the burial of the dead of any land in any city or town other than that already used or appropriated for that purpose, without permission. It also was, and long had been, the duty of the overseers of the poor of each town to bury paupers and indigent strangers dying therein: Stats. 1793, c. 59, secs. 9, 13; Rev. Stats., c. 46, secs. 13, 16. See also, for later statutes on the same subject, Gen. Stats., c. 70, secs. 12, 15; Pub. Stats., c. 84, secs. 14, 17, enlarging their duties. Being under these positive duties, and having authority under Statutes of 1849, chapter 150, to go outside of

the city limits for a burial-ground, the city of Boston purchased the largest portion of the land of the Mount Hope cemetery in West Roxbury in 1857, and has since added to the same at various times, and has received large sums from the sale of lots or burial rights, and has expended large sums in the care and management thereof, and about forty acres still remain unsold. There is no suggestion in argument that in any of these particulars it has acted beyond its powers.

We are not aware that the sale of burial rights in this cemetery has ever been limited to inhabitants of Boston. No such limitation is expressed in the ordinance, but sales may be made to any person or persons: Rev. Ordinances, 1885, c. 47, sec. 4. By Statutes of 1877, chapter 69, section 7, re-enacted in Public Statutes, chapter 82, section 15, towns may sell exclusive burial rights to any persons, whether residents of the town or otherwise, in their cemeteries; and this right extends to cities: Pub. Stats. c. 3, sec. 3, cl. 23. There can be no doubt that the city held this cemetery not only for the burial of poor persons, but with the right to make sales of burial rights to any persons who might wish to purchase them, whether residents or nonresidents. With these duties, and also with these rights and privileges, the city has acquired and improved this property. It is not as if the land had been procured and used exclusively as a place for the free burial of the poor, or of inhabitants of Boston. In addition to these purposes, the city has been enabled to provide a well-ordered cemetery, with lots open to purchase, under carefully prepared rules and regulations, and thus to afford to its inhabitants the opportunity to buy burial-places without being compelled to resort to private cemetery companies, where the expense would probably be greater; and it has done this upon such terms that the burial of its paupers has been practically without expense in the past, and it has about forty acres remaining, the proceeds of which when sold would go into the city treasury but for the requirement of the Statutes of 1889, chapter 265.

The Statutes of 1889, chapter 265, require the city to transfer to the newly formed corporation, called "The Proprietors of Mount Hope Cemetery," without compensation, this cemetery, with the personal property pertaining thereto, and with the right to any unpaid balances remaining due for lots already sold, and the annual income of certain funds held for the perpetual care of lots. If such transfer is made, all that

the city would retain would be the right to bury such persons as it is or may be by law obliged to bury in a certain prescribed portion of the cemetery. Its previous conveyances of lots and rights of burial are expressly confirmed. But it is apparent from the considerations heretofore expressed, that this is not property which is held exclusively for purposes strictly public. The city of Boston is possessed of much other property which in a certain sense and to a certain extent is held for the benefit of the public, but in other respects is held more like the property of a private corporation. Notably among these may be mentioned its system of water-works, its system of parks, its market, its hospital, and its library. In establishing all of these, the city has not acted strictly as an agent of the state government, for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants. If its cemetery is under legislative control, so that a transfer of it without compensation can be required, it is not easy to see why the other properties mentioned are not also; and all the other cities and towns which own cemeteries or other property of the kinds mentioned might be under a similar liability.

In view of all these considerations, the conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the constitutions of Massachusetts and of the United States so that the legislature has no power to require its transfer without compensation: Const. of Mass., Dec. of Rights, art. X, Const. of U. S., Fourteenth Amendment.

In judging of the validity of the particular statute under consideration, Statutes of 1889, chapter 265, there are other reasons leading to the same result. The first is, that the duties of the city in respect to providing a burial-place for the poor and for persons dying within its limits are not taken away. The city is still bound to provide one or more suitable places for the interment of persons dying within its limits: Pub. Stats., c. 82, sec. 9; and it is still bound to bury its paupers and indigent strangers: Pub. Stats., c. 84, secs. 14, 17. If this cemetery should be conveyed away, under the provisions of the Statutes of 1889, chapter 265, the city would be bound to provide another. Certainly the mere continuance of the city's right to bury in a limited portion of the cemetery such persons

as the law requires it to bury is not a provision adequate to meet the requirement of Public Statutes, chapter 82, section 9, and by the report of facts the portion referred to is not likely to suffice even for the burial of paupers for any great length of time. The city is bound to provide a suitable place for the interment of persons dying within its limits; not poor persons only, but all persons; and the burial of the dead in ground not sanctioned by the city authorities is strictly forbidden. So far as we know, it has never been held that the legislature may require a city or town, without compensation, to transfer property which it has bought in order to enable it to discharge its statutory obligations, while at the same time its duties and obligations continue to rest upon it. On the other hand, it is justly assumed that, if the property is to be transferred, the duties will be transferred also: *Rawson v. Spencer*, 113 Mass. 40; *Commonwealth v. Plaisted*, 148 Mass. 375, 886; 12 Am. St. Rep. 566; *Whitney v. Stow*, 111 Mass. 868; *Mayor etc. v. State*, 15 Md. 376, 74 Am. Dec. 572. But the duty of burying paupers, and of providing a place for the interment of all persons dying in Boston, is not imposed upon the petitioner. The duties of the city, and the duties of the petitioner under the Statutes of 1889, chapter 265, are not the same.

Moreover, the legislative power over municipal property, when it exists, does not extend so far as to enable the legislature to require a transfer without compensation to a private person or private corporation. The control which the legislature may exercise is limited; it must act by public agencies and for public uses exclusively. If the city has purchased property for purposes which are strictly and purely public, as a mere instrumentality of the state, such property is so far subject to the control of the legislature that other instrumentalities of the state may be substituted for its management and care; but even the state itself has no power to require the city to transfer the title from public to private ownership. Upon the division of counties, towns, school districts, public property with the public duty connected with it is often transferred from one public corporation to another public corporation. But it was never heard of that the legislature could require the city without compensation to transfer its city hall to a railroad corporation, to be used for a railway station, merely because the latter corporation has a charter from the legislature, and owes certain duties to the public.

It is contended in behalf of the petitioner that it is a public corporation, wholly under the control of the legislature. But it is an error to suppose that a corporation becomes a public one merely by receiving a charter from the legislature, by owing certain duties to the public, and by being subject to rules and regulations established in the exercise of the police power. There is nothing in the case cited, *Woodlawn Cemetery v. Everett*, 118 Mass. 354, to show that the Woodlawn cemetery was regarded as a public corporation. It clearly was not so. It was said to be subject to the police power, like other cemetery corporations: *Commonwealth v. Fahey*, 5 Cush. 408. But liability to the exercise of the police power rests on different considerations, and that power does not extend so far as to include a right to require the transfer of property to another person without compensation. The distinction between public and private corporations is well marked and clear. Public corporations are governmental and political, like counties, cities, towns, school districts—mere departments of the government, established by the legislature, and modified and destroyed without their own consent. Private corporations are formed by the voluntary agreement of their members, and cannot be established without the consent of the corporators. Public corporations, as has been seen, may to some extent, in relation to the ownership of property, partake of the character of private corporations; and, on the other hand, many private corporations are charged with some duties and obligations to the public, as in the case of railroad, telegraph, canal, bridge, gas, and water companies: *Lumbard v. Stearns*, 4 Cush. 60; *Worcester v. Western R. R. Corp.*, 4 Met. 564; *Commonwealth v. Smith*, 10 Allen, 448, 455; 87 Am. Dec. 672. But the general line of distinction between the two classes of corporations is clear: *Linehan v. Cambridge*, 109 Mass. 212; *Rawson v. Spencer*, 113 Mass. 40, 45; Morawetz on Corporations, secs. 3, 24, 1114; 2 Kent's Commentaries, 275; 1 Dillon on Municipal Corporations, 4th ed., secs. 19, 22, 44, 54, 56; Angell and Ames on Corporations, secs. 14, 30 et seq.; *University of Maryland v. Williams*, 9 Gill & J. 365, 397; 81 Am. Dec. 72; *Ten Eyck v. Delaware etc. Canal Co.*, 18 N. J. L. 200; 87 Am. Dec. 233; *Hanson v. Vernon*, 27 Iowa, 28, 53; *In re Deansville Cemetery Assn.*, 66 N. Y. 569; 28 Am. Rep. 86.

An examination of the provisions of the Statutes of 1889, chapter 265, leaves no doubt that the petitioner falls within the

class of private corporations. Its corporate members are such of the proprietors of burial-lots in the existing cemetery as shall accept the act and notify the clerk of the corporation of such acceptance. Membership is wholly voluntary, and in point of fact only about one person out of eight who were entitled to do so became members. The corporation is to be subject to all the provisions of the Public Statutes, chapter 82, so far as they can be applied thereto, and except so far as inconsistent with the Statutes of 1889, chapter 265. Chapter 82 of the Public Statutes relates mostly to private cemetery companies, which may be organized by any ten or more persons: *Jenkins v. Andover*, 103 Mass. 94, 104. Such private cemetery corporation may lay out its real estate into lots, and upon such terms, conditions, and regulations as it shall prescribe may grant and convey the exclusive right of burial, etc. There is nothing in the Statutes of 1889, chapter 265, limiting this right, unless in section 5, providing that the city shall continue to have the right of burial, in a certain prescribed portion of the cemetery, of persons for whose burial it is or may be bound by law to provide, viz., paupers and indigent strangers. Subject to this the petitioner may sell all the remaining lots as fast as it can to all applicants. It is true, under Public Statutes, chapter 82, section 2, it cannot make dividends from the proceeds of sales; but the proprietors of the cemetery at Mount Auburn, and many other private cemetery corporations, are under the like restriction. If the city retains the ownership it may devote the proceeds of sales of lots, after providing for the suitable maintenance of the cemetery, towards the purchase of a new burial-place for its inhabitants when occasion may require. If the petitioner owns it the city will lose that advantage. No duty to the public is imposed upon the petitioner by the terms of the statute unless it is contained in the words in section 4 of the Statutes of 1889, chapter 265, "to be held by said corporation, so far as consistent herewith, for the same uses and purposes, and charged with the same duties, trusts, and liabilities for, and subject to, which the same are now held by said city"; and the further words, "and the said corporation shall have in respect of said cemetery all rights, powers, and privileges, and be subject to all duties, obligations, and liabilities, now had or sustained by said city in respect thereof." What these duties towards the inhabitants of Boston are it may be difficult to say. Certainly there appears to be nothing binding the corporation to

give any preference to inhabitants of Boston in the sale of burial rights, or to prevent a substantial increase in the prices of such burial rights, at the will of the corporation. In short, there is nothing in the act to secure to the inhabitants of Boston those privileges in respect to burial rights which they might properly expect, even if they could not legally demand the same, from the city itself. There is therefore no ground on which the petitioner can be said in any just sense to be a public corporation, and its duties to the inhabitants of Boston are at best but vague and shadowy.

The city further urges that the obligation of the contracts into which it has entered with purchasers of burial rights, for the perpetual care of their lots, would be impaired by the provisions of the Statutes of 1889, chapter 265. Since, for the reasons already given, we are of opinion that the statute was beyond the power of the legislature, it is not necessary to consider this ground of objection to its validity.

Petition dismissed.

LEGISLATIVE CONTROL OVER THE PROPERTY OF MUNICIPALITIES.—*The Functions of a Municipal Corporation May, it is Well Known, be Partly Public and Partly Private*, or, in other words, it may for some purposes and to some extent be a mere instrumentality of the government, to which certain public duties are confided, and upon which corresponding obligations are imposed, and for other purposes it may partake of the character and accomplish some of the objects of private corporations, and be entitled to the same immunity from legislative control as if it were a private instead of a public corporation. "Between the state and municipal corporations, such as cities, counties, and towns, the relation is different from that between the state and the individual. Municipal corporations are mere instrumentalities of the state for the convenient administration of government, and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature. Their tenure of property, derived from the state for specific public purposes, is obtained for such purposes through means which the state can alone authorize; that is, taxation is so far subject to the control of the legislature that the property may be applied to other public uses of the municipality than those ordinarily designated. This follows from the nature of such bodies and the dependent character of their existence. But property derived by them from other sources is often held by the terms of its grant for the special uses from which it cannot be diverted by the legislature. In such cases the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property. And there would seem to be reasons equally cogent, in abstract justice, against a diversion by the legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants": *Commissioners v. Lucas*, 93 U. S. 114. "While this legislative power may be exercised over public and municipal corporations, it has as uniformly been held that towns and other public corporations may have private rights

and interests vested in them under their charter, and as to these rights they are to be regarded and protected the same as if they were the rights and interests of individuals or of private corporations, and grants of property to them in trust for other purposes than corporate and municipal use are no more the subject of legislative control than are the private and vested rights of individuals": *Montpelier v. East Montpelier*, 29 Vt. 12, 19; 67 Am. Dec. 748.

Test of Legislative Authority.—It is clear from the cases already cited that when the legislature has undertaken to dispose of the property of a municipality or to devote it to new uses, or required the municipality to do so, the constitutionality and consequent validity of the legislative action depend upon the nature of the ownership of the municipality of the property. The fact that it has been conveyed to the municipality and that the title stands in its name is not conclusive, nor, we apprehend, does the fact that the property may have been acquired by public funds raised by taxation necessarily authorize the legislative action. If the use for which the property was acquired and the means of its acquisition entitle the city to hold it, not as a mere instrumentality of the government and for the accomplishment of governmental purposes, but wholly or partly for a private purpose, or at least for purposes in which the state had no interest, then, as we understand the decisions, it is in contemplation of law private property, and as such secure from any control which the legislature could not exercise over it were it vested in private individuals for the same purposes: *Louisville v. Trustees of University of Louisville*, 15 B. Mon. 642, 671; *Atkins v. Town of Randolph*, 31 Vt. 226; *New Orleans etc. R. R. v. City of New Orleans*, 26 La. Ann. 478; *People v. Common Council of Detroit*, 28 Mich. 228; 15 Am. Rep. 202; *State v. Haben*, 22 Wis. 660; *People v. Ingersoll*, 58 N. Y. 1, 30; 17 Am. Rep. 178; *Bailey v. Mayor of New York*, 3 Hill, 534; 38 Am. Dec. 669.

In 1820 certain proprietors and the city of New Orleans entered into a compromise in which it was agreed between them that lands constituting part of the batture should remain inviolable and be used for no other public purposes than those for which they were naturally destined. In 1836 the city was divided into municipalities, but it was provided that no disposition of the property should be made in violation of the compromise agreement, and that the inhabitants of the city should not be obstructed in the free use of the property. In 1850 the legislature repealed that part of the act of 1836 prohibiting the disposition of the property, authorized the laying out of certain public streets, and declared that the balance of the batture should be left "open, and so kept for the accommodation of the public and the convenience of commerce," but if the parties to the original compromise should agree thereto, it should be the duty of the municipality to select certain lands for public purposes and to dispose of the remainder. An agreement was entered into by the parties in interest by which this last act was accepted and certain parts of the batture were sold, and the balance, consisting of three squares, was reserved for market purposes, and "vested in perpetuity and full ownership in the municipality," in furtherance of which the other parties in interest assented to and relinquished all claims. In 1869 a statute was passed appropriating to the New Orleans, Mobile, and Chattanooga Railway Company the right to locate, construct, maintain, and use a passenger depot upon a portion of the property thus reserved by and assigned to the municipality. It was held that the property was not public property to the extent of giving the state this control of it, but that, on the other hand, it was vested in the municipality beyond the power of the legislature

to require its dedication to the purposes described in the act: *New Orleans etc. R. R. Co. v. New Orleans*, 26 La. Ann. 478.

It is not very clear from the report of the case just cited what were the uses for which the city held the property in question, or whether in holding it for those uses it should have been regarded as acting in a public or private capacity. That a public square or a park may be held by the municipality in the latter capacity appears to be indisputable. Thus Judge Cooley, speaking for the supreme court of Michigan, said: "It is said in behalf of respondents that the city may hold and own lands for a public park as an individual may for a pleasure ground, and cause them to be beautified and improved as such; and that it could hold the same not in its public capacity as an agency of the government, and therefore subject to the unrestricted control of the state, but as a corporate individual having private rights of its own which it is at liberty to enjoy undisturbed by the state, and in the enjoyment of which the constitution will protect its people": *Mayor v. Park Commrs.*, 44 Mich. 602, 604.

Perhaps it may correctly be said that when a municipality holds property as a trustee that it may be used for public and governmental purposes, the legislature, as it may change the trustee, may divert the title of the municipality, and to some extent, at least, require it to be held for different trusts: *People v. Vanderbilt*, 26 N. Y. 290; but that when the trust, if any may be deemed to exist, is for the use of the corporation or its inhabitants, then the character of the ownership is private, and not subject to legislative control. "In its governmental or public character the corporation is made by the state one of its instruments, or a local depository of certain limited and prescribed political powers to be exercised for the public good in behalf of the state rather than for itself. In this respect it is assimilated in its nature and functions to a county corporation which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers the authority of the legislature is in the nature of things supreme and without limitation, unless limitation is found in the constitution of the particular state. But in its proprietary or private character the theory is, that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers and the property acquired thereunder and contracts made with reference thereto, the corporation is to be regarded *quod ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it is omnipotent": *Dillon on Municipal Corporations*, sec. 66.

Grants to or Contracts with Municipalities Cannot Be Impaired.—Notwithstanding the many cases in which the declaration is made that, with respect to property which the municipality holds in its private and personal character, the legislature has no power to impair the municipal title or to require it to part with the property or to devote it to trusts or purposes for which it was not acquired nor intended; the instances in which property of this character has been rescued from legislative action are so rare that it is difficult to furnish illustrations sufficient to lead to a clear understanding of the rule and its limitations in its application to municipal property. An exception to this remark exists when property has been granted by a state to a municipality, or a contract has been entered into between it and the state, and the latter, by its legislative action, attempts to retract or modify the

grant or to materially impair the obligation of the contract. All cases of this class are admitted to be controlled by the provision of the constitution of the United States forbidding any state to pass any law impairing the obligation of contracts. Therefore if a state has granted lands to a municipality, it can neither retract the grant nor impose limitations upon the action of the municipality with respect to the property which it would not be possible for it to impose had the property been acquired by purchase from a private proprietor: *Town of Pawlet v. Clark*, 9 Cranch, 292; *People v. Ingersoll*, 58 N. Y. 1; 17 Am. Rep. 178; *Webb v. Mayor of New York*, 64 How. Pr. 10; *Terrett v. Taylor*, 9 Cranch, 43, 52.

By virtue of a grant made by the state of Texas one of its counties had become vested with the title to certain lands for school purposes. In a controversy between the county and settlers upon portions of this land their title to the land was held invalid. Subsequently the state, by a special act, required that patents for the lands should be issued to the settlers, thus, if the act were valid, destroying the title of the county. In declaring this statute unconstitutional the supreme court of the state held that the property rights of the county were protected, as a general rule, "by the same constitutional guaranties which shield the property of individuals," and said: "If given for a specific object, the state may very properly, as in the instance under consideration of our school lands granted to counties, exercise such supervision and control over the actions of the counties as to compel proper execution of the trust or prevent its being defeated; but it is believed that this control, unless by the consent of the county, should be subject to the restriction that the purpose for which the property was originally acquired shall, as far as circumstances will admit, be kept in view, and that it shall not arbitrarily be diverted, as in the case before us, to private parties or to wholly different purposes. In relation to these school lands the county, through agents for the state, may be compared to agencies coupled with an interest which cannot be revoked at the pleasure of the principal": *Milam County v. Bateman*, 54 Tex. 153, 166.

A statute of New Hampshire authorized the issuing of bonds for the purpose of reimbursing municipalities for expenses incurred in the late war, and under the statute the town of Andover received a portion of such bonds. Afterwards, by another statute, the legislature declared that a portion of the bonds so assigned to the town should belong to certain individuals. The statute was held unconstitutional because, by the original grant, the bonds or funds in question became the absolute property of the town, and it was not within the power of the state to withdraw or impair its grant: *Spaulding v. Andover*, 54 N. H. 38.

In 1851 the state of California granted to the city of San Francisco the use of certain property for the period of ninety-nine years, and the city subsequently sold a portion of such property, and before payment of the purchase price was made a statute was enacted providing that such payment, or a portion thereof, might be made in purported indebtedness of the city, commonly designated as "city script," which script was required to be received at its par value, that being about ninety per cent greater than its market value at the time. In denying the right of the legislature to thus interfere, the supreme court of the state, speaking by Chief Justice Field, said: "The estate having vested in the city, ceased to be subject to the legislation of the state, except to the same extent that all property is thus subject. It could not be afterwards divested by the state or by any proceedings instituted by her direction. 'A law,' says Mr. Chief Justice Mar-

shall, 'annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances': *Fletcher v. Peck*, 6 Cranch, 137. And between a law thus annulling the conveyances and a law directing the execution of conveyances to third parties of the estate granted, without the consent of the grantees, it is not perceived that there is any substantial difference. The law might as well declare that third parties should possess the estate and direct the mode of its transfer to them as to declare that the original grantors should stand seised of the same. Nor is there any difference in the inviolability of the contract between a grant of property to an individual and a like grant to a municipal corporation. So far as municipal corporations are invested with subordinate legislative powers for local purposes, they are instrumentalities of the state for the convenient administration of the government, and their powers are under the entire control of the legislature; they may be qualified, enlarged, restricted, or withdrawn at its discretion. 'But these bodies,' says Kent, 'may also be empowered to take and hold private property for municipal uses, and such property is invested with the security of other private rights': 1 Kent's Commentaries, 3d vol., 275. 'It may also be admitted,' observes Mr. Justice Story, in his opinion in the case of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 694, 'that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may at its will take away the private property of the corporation or change the uses of its private funds acquired under the public faith.' 'The inhabitants of the city of New York,' says the supreme court of New York, 'have a vested right in the city hall, markets, water-works, ferries, and other public property which cannot be taken from them any more than their individual dwellings or storehouses. Their rights in this respect rest not merely upon the constitution, but upon the great principles of eternal justice which lie at the foundation of all free governments.' The authorities are all to the same purport. A legislative grant is an executed grant, and as such is within the clause of the constitution of the United States which prohibits the state from passing any law impairing the obligation of contracts. This was expressly decided by the supreme court of the United States in *Fletcher v. Peck*, 6 Cranch, 137. It cannot therefore be destroyed and the estate be divested by any subsequent legislative enactment. And though a municipal corporation is the creature of the legislature, yet when the state enters into a contract with it, the subordinate relation ceases, and that equality arises which exists between all contracting parties. And however great the control of the legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts": *Grogan v. San Francisco*, 18 Cal. 590, 612.

General Control of Property Held for Public Purposes.—On the other hand, as we have already shown, every municipality, in so far as it is an agency of the government, is subject to legislative control, and such control extends to property acquired for public purposes. The cases illustrating and applying this rule are sufficiently numerous to enable one to obtain a fair understanding both of the circumstances in which it is applicable and the circumstances in which it must be denied. There are some cases taking a very extreme view of the power of the legislature over the property of mu-

municipalities, and in one instance the judge delivering the opinion of the court maintained that the statement "that where a municipal corporation is empowered to have and hold private property, such property is invested with the security of other private rights," must be "understood to mean only that it possesses such rights against wrongdoers, and not that it is exempt from legislative control": *Darlington v. City of New York*, 31 N. Y. 164, 196; 88 Am. Dec. 248. There is much in the same opinion tending to show that in the judgment of the judge who wrote it all property of every municipality is held under a trust which the legislature has the absolute right to control, but the real question before the court related only to the power of the legislature to require a municipality to make compensation to persons whose property had been destroyed therein in consequence of mobs and riots. The extreme views of this judge have never been adopted nor, so far as we are aware, uttered in any case in which the power of the legislature to make dispositions of the private property of a municipality was directly in issue.

The Control of the Legislature Over the Revenues of a municipality derived from taxation is perhaps as absolute as its control of any other species of municipal property. It may doubtless require equities existing against such revenues to be recognized and discharged. Thus if moneys have been raised for a specific purpose and paid into the treasury of the municipality, after which it becomes clear that the purpose is not to be accomplished nor even longer sought, the legislature may direct the repayment to the taxpayers of the moneys thus received from them: *Commissioners v. Lucas*, 93 U. S. 108, affirming *Lucas v. Board of Commrs.*, 44 Ind. 524. Within certain limits considered by us elsewhere the legislature may validate contracts and impose liabilities on municipal corporations: note to *Hasbrouck v. City of Milwaukee*, 80 Am. Dec. 731-735; and may thus, in effect, appropriate their revenues to purposes not contemplated when they were levied and collected. This doubtless extends to compelling municipalities to discharge claims founded in equity and good conscience, but for the enforcement of which the parties in interest were without any means of redress until the legislature interposed in their behalf by requiring their reimbursement by the city: *Blanding v. Burr*, 13 Cal. 351; *Town of Guilford v. Supervisors*, 13 N. Y. 143; *Creighton v. San Francisco*, 42 Cal. 446; *Craft v. Lofinck*, 34 Kan. 365.

If the legislature may compel municipalities to assume and discharge claims against them founded in equity, it may, upon like reasoning, compel the release of claims in their favor which it would be harsh, inequitable, and unjust to enforce. Therefore, if a public officer and his bondsmen have become liable to an action without any fault of his or theirs, as where burglars break into a safe furnished a county treasurer by the county, and he, notwithstanding his freedom from fault, is liable for the moneys taken therefrom by them, the legislature may release him from this liability. Such a release is "not a gift of property, but a release of a claim which, though legally due, the legislature found that it would be unjust and oppressive to collect": *Pearson v. State*, 56 Ark. 148; 35 Am. St. Rep. 91; *Mount v. State*, 90 Ind. 29; 46 Am. Rep. 192; *Board of Education v. McLandsborough*, 36 Ohio St. 227; 38 Am. Rep. 582.

The legislature may also impose upon a municipality the performance of certain duties of a public nature, and may require it either to raise money, for that purpose or to devote to it revenues already on hand, and hence may require such revenues to be used for such public purposes as constructing and repairing bridges and other public highways, building houses, jails, hospitals, and the like: *People v. Flagg*, 46 N. Y. 401; *People v. Board of Super-*

etc., 50 Cal. 561; *Thomas v. Leland*, 24 Wend. 65; *Boston etc. R. R. Co. v. Central R. R. Co.*, 52 N. J. L. 267; *Guilder v. Otsego*, 20 Minn. 74; *Pumphrey v. Mayor etc. of Baltimore*, 47 Md. 145; 28 Am. Rep. 448; *Carter v. Cambridge etc. Bridge Proprietors*, 104 Mass. 236; *Kirby v. Shaw*, 19 Pa. St. 258; *Perkins v. Slack*, 86 Pa. St. 270. See, however, *People v. Mayor of Chicago*, 51 Ill. 17; 2 Am. Rep. 278.

By virtue of its authority to impose municipal obligations founded in equity and good conscience the legislature may make an appropriation or distribution of public revenues between different municipalities, and may therefore, where revenue has resulted from the taxation of a whole county, set aside a portion thereof to the use of a city within that county to be applied in constructing and repairing streets and bridges therein: *People v. Power*, 25 Ill. 169-187; *Sangamon County v. Springfield*, 63 Ill. 66.

The legislature may also authorize and direct that moneys which when they were collected were applicable to one public purpose shall be applied to another, provided the latter purpose is one which the municipality might be required to promote or accomplish by the exercise of its power of taxation: *City of Indianapolis v. Indianapolis Home*, 50 Ind. 215.

The instances of the appropriation of the revenues of a municipality through the action of the legislature to which we have referred relate to the general revenues, and not to revenues raised for special purposes. This requires further consideration. If the legislature not only attempts to divert them for the purposes for which they were raised, but further to appropriate them to some purpose which is state rather than municipal, this is substantially equivalent, in effect, to taking the property of the municipality and giving it to the state, and is, we think, not defensible. A city in Wisconsin was authorized to levy and collect a special tax of such sum as it might deem necessary to be used for the erection of a suitable high school building, and was also, by the same statute, authorized to raise a further sum for the purpose of aiding and establishing a state normal school and erecting a building to be occupied by such school. The municipal authorities levied and collected a sum for the purpose of the high school, which was paid into the treasury, but did not see proper to do anything in aid of the normal school. Thereafter the legislature enacted a further statute, the effect of which was to take the moneys raised for the high school and devote them to the purposes of the normal school building. This act was declared unconstitutional because it was "a most obvious attempt, at the mere will of the legislature, to deprive the city of so much money lawfully acquired for a proper municipal purpose, and without the assent of its inhabitants to apply it to another purpose not municipal, but one in which all the people of the state have an interest." "As well might the legislature, without the consent of the city, appropriate the high school building itself, after its completion, for a state normal school, as seize the funds provided by the city for the purpose of erecting it. This, we think, would be regarded by every one as wholly unjustifiable by any sound principle of legislation—a mere act of lawless violence. The act in question, though the unjustness of it may not be quite so apparent, in reality stands on no better foundation": *State v. Haben*, 22 Wis. 660. In actions brought in the name of the people of the state of New York to recover moneys fraudulently procured by members of the Tweed ring from the city of New York by allowing fraudulent claims or claims for excessive amounts, the relation of the state to the revenues of the municipality was discussed at length. There was, however, no statute purporting to authorize the actions in question, and they were held not sustain-

able, because the state did not have any ownership in the moneys in question, nor was it a trustee of them so as to permit it to sustain an action for the benefit of the city or its inhabitants: *People v. Ingersoll*, 58 N. Y. 1; 17 Am. Rep. 178; *People v. Fields*, 58 N. Y. 491. We apprehend that the power of the legislature to compel a municipality to enter into a contract of a private nature, or to devote its revenues to private purposes, does not exist. Doubt may be entertained as to whether the purpose in question, as where it is the taking stock in a railway corporation, is private or public within the meaning of the rule. But whenever the purpose is found by the court to be private in its nature, the legislature cannot compel a municipality to participate in it, nor to devote its bonds or revenues to it: *People v. Batchelor*, 53 N. Y. 128; 13 Am. Rep. 480; *Atkins v. Town of Randolph*, 31 Vt. 226.

Property Held for Public Purposes.—As between a city and the state the latter may exercise almost unlimited control over the property of the former held for public purposes, provided such control is not attempted to be asserted in a way to devote such property to private uses. Thus, if a municipality holds the fee of the streets therein the legislature may, as against it, authorize their use for public or quasi public purposes for which they have not before been used, as for the purpose of constructing and operating a railway therein: *Clinton v. Cedar Rapids R. R. Co.*, 24 Iowa, 455; *People v. Kerr*, 27 N. Y. 188; *Mercer v. Pittsburgh etc. R. R. Co.*, 38 Pa. St. 92. It should be remembered that we are not here discussing the question whether the use of the streets for this purpose imposes a new servitude, for which the owner of the abutting property is entitled to compensation, a question upon which the courts are not at all in harmony: *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass. 515; 28 Am. Rep. 264, and note; *Stanley v. City of Davenport*, 54 Iowa, 463; 37 Am. Rep. 216, and note; *Hussner v. Brooklyn City R. R.*, 114 N. Y. 433; 11 Am. St. Rep. 679; *Theobald v. Louisville etc. Ry. Co.*, 66 Miss. 279; 14 Am. St. Rep. 564, and note; *Adams v. Chicago etc. R. R.*, 39 Minn. 286; 12 Am. St. Rep. 644; *Ford v. Chicago etc. R. R. Co.*, 14 Wis. 609; 80 Am. Dec. 791; but are merely affirming that as against the municipality itself, and without entitling it to compensation, the state may authorize the use of its streets by railway corporations. In truth, as between the city and the state, the control of the former over the streets and other public highways seems to be absolute. At all events it may make any disposition of them consistent with their still remaining public streets to be used for public purposes, and the control of them which the municipality had exercised as an agency of the government may be transferred to any other agency selected by the legislature, and therefore it may create a board of park commissioners, by whom the streets are to be controlled for boulevard and driveway purposes. "The legislature represents the public. So far as concerns the public it may authorize one use to-day and a different use to-morrow. If the new use affects private rights proceedings for condemnation may have to be invoked, but so far as it affects the public alone its representative, in the absence of constitutional restraint, may do as it pleases": *People v. Walsh*, 96 Ill. 232; 36 Am. Rep. 135.

Whether a street or public square may by legislative action be diverted from the public purpose for which it has been acquired or to which it was dedicated is a question which we have not seen discussed. In many cases it has been held not subject to acquisition to private ownership by prescription, because the municipality had no power to part with its title, and hence there could be no presumption of a grant, which was said to be the basis of title by prescription: *County of Yolo v. Barney*, 79 Cal. 375; 12 Am. St. Rep.

152; *Vialia v. Jacob*, 65 Cal. 434; 52 Am. Dec. 303; *Fort Smith v. McKibbin*, 41 Ark. 45; 48 Am. Rep. 19; note to *City of Cincinnati v. First Presb. Church*, 32 Am. Dec. 719-721; *Orr v. O'Brien*, 77 Iowa, 253; 14 Am. St. Rep. 277, and note. There must, however, be some instances in which such property is subject to transfer, as where the public purpose for which it was held has been abandoned, as happens when a public highway is vacated and discontinued: *Lindsay v. City of Omaha*, 30 Neb. 512; 27 Am. St. Rep. 415; *Meyer v. Teutopolis*, 131 Ill. 552. In the absence of any direct constitutional prohibition the legislative authority extends to the abandonment of public highways, though the effect may be to restore them to private proprietorship. "To open highways, whether streets or county roads, and to vacate those which are useless, inconvenient, and burdensome, is a power which must reside somewhere in every well-regulated government. In our own we have many laws conferring this authority on courts, on county and township officers, on city and borough councils, and on special commissioners. In very many cases, also, the general assembly has, by its own direct and immediate acts, ordered that streets and roads should be vacated as well as opened, widened, and otherwise altered. Do all these laws violate the constitution? We cannot find anything in that instrument with which they are in conflict. Surrendering the right of way over a public road to the owners of the soil is not taking private property for public use": *Paul v. Carver*, 24 Pa. St. 207; 64 Am. Dec. 649. In California a portion of the pueblo lands of a city was selected as a public square; an adverse claim being made to it a compromise agreement was made between the city and the claimant by which each conveyed to the other a portion of the property, and this compromise was ratified by the legislature. In an opinion of the supreme court the statement was made in general terms that the legislature could not ratify such a disposition of the trust property: *City of San Francisco v. Itell*, 80 Cal. 58. We regret that neither the reasons nor the authorities leading to this conclusion were stated. In their absence we think this dictum of the court not supportable. We apprehend that where, as in this case, property is held by a city, as a public square, in trust for the general public, the legislature must have plenary authority over it, including the power to determine not only what is best for the interests of that public, but also whether it shall longer be held for public use.

A municipality may acquire property acting as a governmental agency in the carrying out of a plan of collecting revenues of the state or of some subdivision thereof, in which event the state still retains control, and may modify or release the property rights of the municipality. In New Jersey, by statute, the Essex Public Road Board was created and charged with the duty of constructing and maintaining public carriage roads in the county of Essex. The board was authorized to make assessments and to sell lands to compel their payment, and, when there were no purchasers or when the first purchaser failed to comply with his bid, the lands were required to be struck off to the road board by its corporate name for the term of fifty years to be held, sold, assigned, or disposed of for the use of the county. Afterwards, by another statute, proceedings were authorized under which persons whose lands had been sold might by proceeding thereunder set forth the claims against them for adjustment and compromise. It was claimed in opposition to the proceedings under this act that by the sale of the land the county acquired a vested interest therein which was beyond the legislative control, but the court in overruling this claim, said: "We do not concur in this view. The public road board was an involuntary quasi corporation, created to con-

struct a public work and authorized to procure the means to accomplish the improvement by the imposition of assessments upon private property. It was merely a governmental agency, existing wholly for public purposes, and whose interests belonged exclusively to the public. The power of the legislature over it was plenary. It held, and could hold, no real estate in a proprietary or private sense, and after it was empowered to bid at its own sale, it acquired no more proprietary interest in the real estate struck off to it than it had in the assessment. Its purchase was in perpetuation of the lien and in aid of collection, and it was as competent for the legislature, as between it and its own agent, to prescribe terms upon which the landowner might redeem, as to abolish the board and rescind the assessment altogether, as it might do, saving any vested right of third parties": *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 339. The power which a municipal corporation has to raise money by means of taxation, while confessedly a valuable power, is one which it is equally clear is of a public nature and derived from the legislature and within legislative control. The grant of this power is not a contract, and therefore is not protected from impairment by the provision of the constitution of the United States forbidding the enactment by a state of any law impairing the obligation of contracts: *Williamson v. New Jersey*, 130 U. S. 189, 199. It has also been held that if a city has the right to pay for its water supply in taxes, this is not a property right, and may therefore be taken away by legislation: *New Orleans v. New Orleans W. W. Co.*, 142 U. S. 79.

Property Held in Trust.—A municipality may hold property as a trustee for the purpose of executing specific trusts created by a private person. The trust thus created is not beyond legislative control, though it may be exempt from legislative destruction or impairment. The trust may be changed, the appointment of a new trustee authorized or required, and the carrying out of the trust taken away from the city and devolved upon him: *Philadelphia v. Fox*, 64 Pa. St. 169. Lands may be held by a city in trust for its inhabitants and for certain purposes, as were the pueblo lands of towns in those parts of the United States acquired from Mexico. This trust is within the control of the legislature, which may validate conveyances void when made and in general direct the persons to whom, and the manner in which, the lands may be disposed of: *Payne v. Treadwell*, 16 Cal. 220, 236; *San Francisco v. Canavan*, 42 Cal. 541, 558; *Thompson v. Thompson*, 52 Cal. 157. While the legislature may change the trustee, though such trustee happens to be a municipal corporation, yet in so far as the corporation may be a beneficiary under such trust, we apprehend that its equitable and beneficial interest is neither more nor less subject to impairment by the legislature than if it were united with the legal title: *North Yarmouth v. Skillinge*, 45 Me. 133; 71 Am. Dec. 530; *Greenville v. Mason*, 53 N. H. 515; *State v. Springfield Tp.*, 6 Ind. 83; *Trustees v. Bradbury*, 11 Me. 118; 26 Am. Dec. 515; *Plymouth v. Jackson*, 15 Pa. St. 44.

A municipality as a governmental agency may organize and control police and fire departments, and acquire property for their use. It has, however, no vested right to such control, either over the departments, or the property so acquired. It is not held in a private capacity, and therefore both the control of the departments and of the property may by the legislature be transferred to some other agency, as, for instance, to commissioners appointed by it. "City property may be taken for public purposes other than the uses of the city; that is, we suppose that property owned by the city might be condemned in some instances as any other property; but then the

use would pass from the city into other hands from whom the payment or compensation would be made to the city as recent owner; but this doctrine cannot apply where the design is merely to take city property, dedicated to particular uses, and apply the same property to the same purposes by only changing the agency by which the use is to be directed. The use is the same, and the character of the property is not changed, nor the title, because no matter by whom managed it remains public, devoted to public use, and all the while belongs, not to the commissioners, but to the city": *Mayor of Baltimore v. State*, 15 Md. 376; 74 Am. Dec. 572, 585.

Franchises granted by a state to a municipality, especially if of a public nature, such, for instance, as a right to maintain a ferry or wharf, and to collect tolls for the use thereof, are not regarded as resting upon contract, and may therefore be impaired or destroyed at the pleasure of the legislature: *Trustees of Schools v. Tatman*, 13 Ill. 27, 30; *New Orleans R. R. Co. v. Ellerman*, 105 U. S. 166; *Town of East Hartford v. Hartford Bridge Co.*, 10 How. 511; *Police Jury v. Shreveport*, 5 La. Ann. 661.

Control Over Property by Dividing or Destroying Municipalities.—As an incident to its conceded authority to destroy or divide, as well as to create, municipalities, and to direct the extent of their boundaries, the legislature exercises power over their property, and often transfers it from one municipality to another. As to legislative power to enlarge or diminish counties and other municipalities, and to divide one of them into two or more parts, there is no doubt: *Laramie County v. Albany County*, 92 U. S. 307, 311. It is equally beyond question that in any division it may make it can determine what proportion of the liabilities of the old municipality shall be borne, and what share of its property shall belong to each of the new municipalities: *Morgan v. Beloit*, 7 Wall. 617; *Morrow County v. Hendryx*, 14 Or. 397; *Stone v. Charlestown*, 114 Mass. 214; *Dunmore's Appeal*, 52 Pa. St. 374; *Montpelier v. East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748; *Weymouth etc. Fire District v. County Commrs.* 108 Mass. 142. It may abolish subdivisions of a municipality, such, for instance, as its school districts, and vest their property in, and impose their liability upon, the municipality: *Whitney v. Inhabitants of Stow*, 111 Mass. 368; *Rawson v. Spencer*, 113 Mass. 40. Nor is express legislative action necessary to transfer the property of a municipality upon its division. Such transfer is implied from the statute making or authorizing such division. Hence, in the absence of any statute to the contrary, upon the division of the territory of a municipality, it retains only such of its property as remains within its new limits, and the residue is transferred to the municipality of whose territory it becomes a part: *Wellington v. Wellington Township*, 46 Kan. 213; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *School Township v. School Township*, 109 Ind. 559; *City of Lynn v. Nahant*, 113 Mass. 433; *North Hempstead v. Hempstead*, 2 Wend. 110; *Laramie County v. Albany County*, 92 U. S. 315; *Montpelier v. East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748. Instead of merely dividing or changing the boundaries of a municipality, the legislature may abolish it altogether, in which case its property rights are necessarily destroyed, and the property vested in the state, to be devoted to such public uses as it may by its legislature direct: *Merriwether v. Garrett*, 102 U. S. 472; *Montpelier v. East Montpelier*, 27 Vt. 704; *People v. Hill*, 7 Cal. 103.

When a municipality has been divided, the property which it holds in trust does not appear to be subject to the rules stated in the last paragraph, though the statute authorizing the division expressly provides that all the property shall be divided. If the old municipality may be regarded as

still continuing, the property and the right and duty of executing the trust devolve upon it: *Harrison v. Bridgeton*, 16 Mass. 16. If, on the other hand, the statute or the proceedings taken under it result in the creation of two new corporations out of what was before a single municipality, the effect is to destroy the trustee without creating any other person, natural or artificial, to take his place. Neither municipality has any remedy at law. Chancery may, however, give relief by appointing a new trustee, and requiring him to execute the original trust: *Montpelier v. East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748; *Montpelier v. East Montpelier*, 27 Vt. 704.

LYNN GAS AND ELECTRIC COMPANY v. MERIDEN FIRE INSURANCE COMPANY.

[158 MASSACHUSETTS, 570.]

INSURANCE AGAINST FIRE, LOSS COVERED BY.—Insurance against loss by fire includes loss where the cause insured against was the means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it or set it in motion, if the original effective cause was not itself made a subject of separate insurance in the contract between the parties.

INSURANCE AGAINST FIRE, WHEN INCLUDES A LOSS ARISING FROM ELECTRICITY.—If insurance is effected on a building and machinery used for generating electricity, and thereafter a fire occurs in the building which is speedily extinguished, but as a result of the fire, in a part of the building remote therefrom, what is known as a "short circuit" was produced, from which machinery was greatly damaged, this is a damage by fire within the meaning of the policy. The fire was a direct and proximate cause of the damage according to the meaning of the words, "direct and proximate cause," as interpreted by the best authorities.

ACTION upon several policies of insurance against loss by fire to a building and machinery owned by plaintiff, and used at the time the insurance was effected in generating electricity. Verdict and judgment for the plaintiff

S. Lincoln and J. D. Bryant, for the defendants.

W. H. Niles, for the plaintiff.

KNOWLTON, J. The only exception relied on by the defendants in these cases is that relating to the claim for damage to the machinery used in generating electricity and to the building from a disruption of the machinery. This machinery was in a part of the building remote from the fire, and none of it was burned. In his charge to the jury the judge stated the theory of the plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection

was made between them called a short circuit; that the short circuit resulted in keeping back or in bringing into the dynamo below an increase of electric current that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed and the succeeding pulleys up to the jack-pulley were ruptured; that by reason of pieces flying from the jack-pulley, or from some other cause, the fly-wheel of the engine was destroyed, the governor broken, and everything crushed—in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt through the action of electricity, and that caused the damage.” The plaintiff contended that the short circuit was produced by the fire, either by means of heat on the horns of the lightning arresters, or by a flame acting as a conductor between the two horns, or in some other way. The jury found that the plaintiff’s theory of the cause of the damage was correct, and the question is whether the judge was right in ruling that an injury to the machinery caused in this way was a “loss or damage by fire,” within the meaning of the policy.

The subject matter of the insurance was the building, machinery, dynamos, and other electrical fixtures, besides tools, furniture, and supplies used in the business of furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity.

The subject involves a consideration of the causes to which an effect should be ascribed when several conditions, agencies, or authors contribute to produce an effect. The defendants contend that the application of the principle which is expressed by the maxim, *In jure non remota causa sed proxima spectatur*, relieves them from liability in these cases. It has often been necessary to determine, in trials in court, what is

to be deemed the responsible cause which furnishes a foundation for a claim when several agencies and conditions have a share in causing damage, and the best rule that can be formulated is often difficult of application. When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen: *Freeman v. Mercantile etc. Assn.*, 156 Mass. 351. The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases: *McDonald v. Snelling*, 14 Allen, 290; 92 Am. Dec. 768; *Perley v. Eastern R. R. Co.*, 98 Mass. 414, 419; 96 Am. Dec. 645; *Gibney v. State*, 137 N. Y. 529. In *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469, 474, Mr. Justice Strong, who also wrote the opinions in *Insurance Co. v. Transportation Co.*, 12 Wall. 194, and in *Western Massachusetts Ins. Co. v. Transportation Co.*, 12 Wall. 201, which are much relied on by the defendants, used the following language in the opinion of the court: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place: *Scott v. Shepherd*, 2 W. Bl. Rep. 892.

The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

If this were an action against one who negligently set the fire in the tower, and thus caused the injury to the machinery, it is clear, on the theory of the plaintiff, that the negligent act of setting the fire would be deemed the active efficient cause of the disruption of the machinery and the consequent injury to the building. It remains to inquire whether there is a different rule in an action on a policy of fire insurance.

Under our statute creating a liability for damages received from defects in highways, it is held that the general rule is so far modified that there can be no recovery unless the defect is

the sole cause of the accident; but this doctrine rests on the construction of the statute: *Tisdale v. Norton*, 8 Met. 388; *Marble v. Worcester*, 4 Gray, 395; *Jenks v. Wilbraham*, 11 Gray, 142; *McDonald v. Snelling*, 14 Allen, 290; 92 Am. Dec. 768; *Babson v. Rockport*, 101 Mass. 93.

In suits brought on policies of fire insurance, it is held that the intention of the defendants must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it, or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage, although the negligent act is the direct, proximate cause of the damage, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire: *Johnson v. Berkshire etc. Ins. Co.*, 4 Allen, 388; *Walker v. Maitland*, 5 Barn. & Ald. 171; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213; *Peters v. Warren Ins. Co.*, 14 Pet. 99; *General Mut. Ins. Co. v. Sherwood*, 14 How. 351; *Insurance Co. v. Tweed*, 7 Wall. 44. This is the only particular in which the rule in regard to remote and proximate causes is applied differently in actions on fire insurance policies from the application of it in other actions. A failure sometimes to recognize this rule as standing on independent grounds, and established to carry out the intention of the parties to contracts of insurance, has led to confusion of statement in some of the cases. The difficulty in applying the general rule in complicated cases has made the interpretation of some of the decisions doubtful; but on principle, and by the weight of authority in many well-considered cases, we think it clear that, apart from the single exception above stated, the question, What is a cause which creates a liability? is to be determined in the same way in actions on policies of fire insurance as in other actions: *Scripture v. Lowell etc. Ins. Co.*, 10 Cush. 356; 57 Am. Dec. 111; *New York etc. Express Co. v. Traders and Mechanics' Ins. Co.*, 132 Mass. 377; 42 Am. Dec. 440; *St. John v. American etc. Ins. Co.* 11 N. Y. 516; *General Mut. Ins. Co. v. Sherwood*, 14 How. 351; *Insurance Co. v. Tweed*, 7 Wall. 44; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 225; *Livie v. Janson*, 12 East, 648; *Ionides v. Universal Mut. Ins. Co.*, 14 Com. B., N. S., 259; *Transatlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70;

40 Am. Rep. 403; *United etc. Ins. Co. v. Foote*, 22 Ohio St. 840; 10 Am. Rep. 735.

In the present case, the electricity was one of the forces of nature—a passive agent working under natural laws—whose existence was known when the insurance policies were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and working precisely as the defendants would have expected it to work if they had thoroughly understood the situation and the laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words “direct and proximate cause,” as interpreted by the best authorities. The instructions to the jury were full, clear, and correct, and the defendants’ requests for instructions were rightly refused.

Exceptions overruled. —

INSURANCE—WHAT IS COVERED BY THE RISK.—An insurance policy which insures against loss or damage by fire without qualification is broad enough to include all fire however originating, and all damages therefrom of whatever character. So under such a policy an explosion which is the result of an antecedent fire on the premises will not affect the liability of the insurer for the loss, though the principal damage resulted from the explosion, and not from the fire: *Renshaw v. Missouri etc. Ins. Co.*, 103 Mo. 595; 23 Am. St. Rep. 904, and extended note. See extended notes to *Hillier v. Alleghany County etc. Ins. Co.*, 45 Am. Dec. 657; and *McOluer v. Girard etc. Ins. Co.*, 22 Am. Rep. 253. See also *Boatman's etc. Ins. Co. v. Parker*, 23 Ohio St. 85; 13 Am. Rep. 228.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

LANSING v. HAYNES.

[95 MICHIGAN, 16.]

WILLS, REVOCATION OF, BY DIVORCE.—When, at the time that a decree of divorce is granted the parties to the action have settled their property rights by mutual agreement in writing, without mentioning mutual wills made by them ten years before by which each devised to the other all of his or her property, the decree of divorce and settlement constitutes an implied revocation of the wills.

M. D. Chatterton and Q. A. Smith, for the contestants and appellants.

Jay P. Lee, for the proponent and appellee.

GRANT, J. The facts in this case are these: The proponent and Garret Y. Lansing were married in December, 1864. They lived together as husband and wife until 1889, when she filed a bill of divorce against him, and an absolute decree of divorce was rendered in her favor June 6, 1889. He died in September, 1891. They had no children. December 10, 1881, they executed mutual wills, which were identical in language, he devising all his property to her, and she devising all her property to him. By agreement between them she took possession of both wills, and preserved them until the decree of divorce was rendered, after which she destroyed her own, and deposited his will with her brother. This action on her part was not known to Mr. Lansing. May 2, 1889, pending the divorce suit, she and her husband made a division of his property, he conveying to her by warranty deed certain real estate, and she releasing by quitclaim deed all interest in the remainder of his real estate. On the same day

an agreement was executed by them, in duplicate, by which he conveyed to her certain personal property, and she agreed to release him from all demands of every kind or nature, and agreed to pay her own costs and expenses of the divorce suit. It was stated in this agreement that it and the deeds executed by them were intended as a property settlement between them. As is usual in such cases the feeling between them, at least upon her part, became bitter. She did not speak to him for three months before the decree, nor afterwards. His place of business was three blocks from her home, and she avoided passing by it. After his death she presented his will for probate. The probate court probated the will, and, on appeal to the circuit court, this action was sustained.

The three propositions of the contestants are as follows:

1. That these mutual wills formed a contract, and that the proponent, having revoked her own will, is thereby estopped from claiming under this will.

2. That the deeds and agreement constitute an express revocation of the will.

3. That the will of the deceased is revoked by implication of law on account of the changed relations of the parties.

1. If these wills constituted a binding contract between the parties, that question cannot be litigated in a contest over the probate of either will. The probate court has no jurisdiction to determine such questions. The two questions for that court to determine were: 1. Was the document presented at the time of its execution the last will and testament of the deceased? and 2. Had it been revoked?

2. The statute provides that:

“No will, nor any part thereof, shall be revoked unless by burning, tearing, canceling, or obliterating the same with the intention of revoking it by the testator, or by some person in his presence, and by his direction, or by some other will or codicil, in writing, executed as prescribed in this chapter, or by some other writing signed, attested, and subscribed in the manner provided in this chapter for the execution of a will, excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator”: Howell’s Stats., sec. 5793.

No reference whatever is made in the deeds and the agreement to these wills. They have an important bearing upon the question of an implied revocation, but we do not think

that they constitute the express revocation contemplated by the statute.

8. The difficult question is whether the will was revoked by implication.

“Implied revocations are founded upon the reasonable presumption of an alteration of the testator’s mind, arising from conditions since the making of the will, producing a change in his previous obligations and duties. . . . There is not, perhaps, any code of civilized jurisprudence in which this doctrine of implied revocation does not exist, and apply when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator”: 4 Kent’s Commentaries, 521. See also Smith’s Probate Law, 50; 2 Greenleaf on Evidence, sec. 684; Woerner’s Administration, sec. 48.

It is contended by the proponent that the only changed relations from which revocation can be implied are the marriage of a *feme sole* and the marriage of a man and birth of issue; and these appear to have been at the common law the two principal reasons for such implication. But this rule was not without exceptions: *Will of Ward*, 70 Wis. 251; 5 Am. St. Rep. 174, and authorities there cited. The revocation must rest upon presumption, not upon intention. Verbal declarations of the testator as to his intentions or understanding are incompetent: *Hoitt v. Hoitt*, 63 N. H. 475; 56 Am. Rep. 530. The married woman’s act is held to have abrogated this rule of the common law as to married women, by giving to her the absolute control and disposal of her separate property: *Will of Ward*, 70 Wis. 251; 5 Am. St. Rep. 174. So this court has held that the constitutional provision giving her the right to devise her separate property acquired before marriage, or which she may afterwards acquire by gift, grant, inheritance, or devise, has abrogated this rule: *Noyes v. Southworth*, 55 Mich. 173; 54 Am. Rep. 359. So the birth of an illegitimate child, recognized and acknowledged by the father, was held to revoke a will made before the birth of the child: *Milburn v. Milburn*, 60 Iowa, 411.

It is held in Ohio that a divorce obtained by the husband does not operate as a revocation of a will made by the husband on the day of his marriage, but before and in contemplation of the marriage. The testator in that case devised to his wife one thousand dollars, and the remainder of his property to his children by a former marriage. It was there said

that the legacy did not depend upon the marriage, and could not therefore be lost by the divorce, and that the wife could lose no more by the divorce than she gained by the marriage: *Charlton v. Miller*, 27 Ohio St. 298; 22 Am. Rep. 307. So far as we have been able to investigate this is the only adjudicated case involving the effect of a divorce upon the precise point at issue. That case differs from this, however, in the fact that there had been no settlement, upon the granting of the divorce, of the property rights of the parties. It is also noteworthy that in that case much stress was laid upon the fact that the relations of the parties at the time of the execution of the will, and at the testator's death, were the same.

In *Tyler v. Tyler*, 19 Ill. 151, it is held that marriage, under a statute making the wife heir to the husband, and the husband heir to the wife, revoked the husband's will made prior to the marriage, and disposing of his entire estate without any provision for her; and this, too, though the marriage was without issue.

By the decree of divorce in this case the parties became as strangers to each other, and neither owed to the other any obligation or duty thereafter. There was, therefore, a complete change in these relations, within the language above quoted from Chancellor Kent. It is not, in my judgment, the natural presumption that after the testator had settled with her, had conveyed to her a good share of his property, and they, by agreement, had terminated all their property, as well as their marital, relations, the will executed nearly ten years before should remain in force, and operate upon his death as a conveyance of the remainder of his property to her, to the exclusion of his heirs. If this were so, then it would follow that if he had children living, or a dependent mother or other dependent relatives, or a second wife without issue, his duties and obligations towards them must be set aside in favor of a most harsh and unjust rule. The like result would follow where the husband had obtained a divorce from his wife on the ground of her adultery, and she had become a common prostitute; or where the wife had obtained a divorce for a like reason, or because her husband had committed a felony, for which he was incarcerated in prison. To hold the will unrevoked under these circumstances would be repugnant to that common sense and reason upon which law is based. I do not think the common law is so unbending as

to lead to this result. "The reason of the law is the essence and soul of the law."

Divorces in England were infrequent, and this may well be held to account for the fact that this question has not arisen there for adjudication in the courts. The natural presumption arising from these changed relations is the reasonable one, and the one which in law implies a revocation. The question is not to be controlled by a possible presumption, but by the reasonable presumption. The possibility, therefore, that the deceased might have desired that the remainder of his property should go to his divorced wife cannot be considered in determining the question of an implied revocation in this case. Such disposition of his property would be unusual, and contrary to common experience.

It follows that the judgment must be reversed, and judgment entered in this court for the contestants.

The other justices concurred.

WILLS.—IMPLIED REVOCATION OF: See extended notes to *Graham v. Burch*, 23 Am. St. Rep. 356, and *Graves v. Sheldon*, 15 Am. Dec. 659. For a discussion of the implied revocation of wills from marriage and birth of issue, see extended notes to *Young's Appeal*, 80 Am. Dec. 516, and *Nagus v. Nagus*, 26 Am. Rep. 159.

KIRKWOOD v. HOXIE.

[95 MICHIGAN, 62.]

MECHANICS' LIENS.—FAILURE TO FILE STATEMENT of claim in accordance with the statute relating to mechanics' liens, will not deprive one furnishing material to be used in the construction of a house of the benefit of such lien when the rights of *bona fide* purchasers are not involved, and by the terms of the statute the lien attaches upon the furnishing of materials for a structure to be erected on land under a contract with the owner.

MECHANICS' LIENS—WHETHER AFFECTED BY SUBSEQUENT LEGISLATION OR PERSONAL JUDGMENT.—A vested right to a mechanic's lien for materials acquired under one statute is not affected by a change made by a subsequent statute providing that such lien shall not attach unless a notice of claim is made within sixty days, especially if the latter act is declared unconstitutional. Nor is the lien so acquired lost by an attempted enforcement of the material-man's claim under the latter statute resulting in a personal judgment in his favor before it is declared unconstitutional.

MECHANICS' LIENS—WAIVER—BURDEN OF PROOF.—When a mechanic's lien is once established the burden of proof is upon the owner of the estate charged to show its relinquishment. While this may be inferred from circumstances, such inference may also be rebutted.

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MECHANICS' LIENS—WAIVER BY PERSONAL JUDGMENT.—A mechanic's lien is not waived by taking a personal judgment against the debtor especially when accompanied by circumstances clearly showing an intention to preserve rather than to relinquish such lien.

MECHANICS' LIENS—WAIVER BY PERSONAL JUDGMENT—PURCHASER WITH NOTICE.—When, after a mechanic's lien has attached to land, the material-man takes a personal judgment against the debtor under circumstances clearly showing an intention to preserve rather than relinquish such lien, it will not be held to have been waived in favor of a subsequent purchaser who acquired title to the land with notice of its existence.

E. E. Osborn, for the appellant.

C. F. Button, for the appellees.

HOOKER, C. J. The complainant purchased the premises in controversy at administrator's sale, taking the usual administrator's deed. The license from the probate court upon which the sale was made directed that the property be sold "subject to all encumbrances, by mortgage or otherwise, existing at the time of the death of the deceased," John T. Atkinson. The report of sale shows that the complainant bought the property on September 10, 1889, for twenty-five dollars, "subject to all liens and encumbrances." At this time the defendants claimed to have a lien upon the premises, and the inference from the proof is strong that both complainant and the administrator, as well as the defendants, who were present, understood that the sale was subject to this lien; the same with other encumbrances, amounting to the value of the land, viz., about three thousand eight hundred dollars.

The history of this lien is substantially as follows: The defendants furnished a quantity of building material for a store which was erected upon the premises, beginning in September, 1887, under a contract between themselves and Atkinson. On January 6, 1888, they filed a notice of lien in conformity to that prescribed by the lien law of 1887: Act No. 270, Laws of 1887. This was followed by proceedings under the same act, which on November 13, 1888, culminated in a judgment in favor of these defendants, against John T. Atkinson, for the sum of one thousand and fifty dollars and costs, to which judgment was appended the following, viz:

"And, by consent of parties in open court, it is ordered that the execution be stayed in this cause, without a bond, until the first day of the next term of court, and that the amount of this judgment is a lien upon the property."

The costs were subsequently taxed at the sum of seventy-three dollars. Soon after this, Atkinson, the judgment debtor, died. Complainant, having purchased the premises, as already stated, went into possession under his deed in November, 1889, and, learning that the lien law of 1887 had been declared unconstitutional, on January 8, 1890, filed the bill in this cause to remove the cloud occasioned by this alleged lien. On July 18, 1890, defendants filed a new statement of their lien, in accordance with the law of 1885, and on September 1, 1890, they assigned their interest in the lien and debt to the National Bank of Oshkosh.

The decision of this court in the case of *John Spry Lumber Co. v. Sault etc. Trust Co.*, 77 Mich. 199, 202, 18 Am. St. Rep. 396, not only declared the lien law of 1887 unconstitutional, but stated that such statute, and "all its parts, must fall together, leaving the law of the state where it was before the law of 1887 was passed." This decision leaves defendants' lien to rest upon the law of 1885. By the terms of that act the lien attaches to the land when the vendor furnishes material for a structure to be erected thereon under a contract with the owner: Act No. 216, Laws of 1885, secs. 2, 8. In this particular it differs from other lien laws, and notably that of 1887 (3 Howell's Statutes, sec. 8398 c), which provides that a lien shall not attach unless a notice is filed with the register of deeds within sixty days, etc. The object of the legislature in passing the law of 1885 appears to have been to create a subsisting lien independent of the notice and proceedings to enforce it. They do not seem to be necessary to its existence, and only affect it when the interests of *bona fide* purchasers, etc., are involved. It would seem to follow that the defendants acquired a vested interest, in the nature of a mortgage or security, upon this land, of which they could not be deprived by a failure to file a statement of their claim in accordance with the law of 1885. Nor could the lien be lost by any change made by subsequent legislation, the right being vested under the law of 1885.

We may next inquire whether this lien has been lost by any act of the defendants. Previous to the passage of the act of 1887, the authority to enforce these liens had been vested in courts of chancery. An attempt was made by the act of 1887 to give this power to a court of law, by authorizing the court, in an action upon the contract, to declare the judgment a lien upon, and enforce it against, the land. Defend-

ants accordingly began an action and took a judgment against Atkinson, claiming a lien upon the premises, which, as already appears, the parties agreed should be a lien. Defendants contend that this is a valid judgment to the extent of establishing their lien, while complainant contends that it is a valid judgment, but only to the extent of making defendants ordinary judgment creditors, to the exclusion of their lien, which he claims was waived by their taking a personal judgment. We have no doubt that the judgment is valid as a personal obligation, as it was rendered in a proceeding which, in every respect, seems to have followed the course of an ordinary action of *assumpsit*, but aside from that, it was an attempt on the part of the circuit court to do an act beyond and outside of its jurisdiction. To the extent of making it a lien upon the land, the proceedings were *coram non judice*, and void. The consent of the parties does not help the matter under the well-settled rule that consent cannot confer jurisdiction upon, or extend the jurisdiction of, a court, as to the subject matter, beyond that which the law confers: *Beach v. Botsford*, 1 Doug. 199; 40 Am. Dec. 45; *Clark v. Holmes*, 1 Doug. 390; *Spear v. Carter*, 1 Mich. 19; 48 Am. Dec. 688; *Wilson v. Davis*, 1 Mich. 156; *Allen v. Carpenter*, 15 Mich. 25; *Farrand v. Bentley*, 6 Mich. 281; *Moore v. Ellis*, 18 Mich. 77; *Thompson v. Michigan etc. Assn.*, 52 Mich. 522; *Youngblood v. Sexton*, 32 Mich. 406; 20 Am. Rep. 654.

We may next inquire whether the defendants have waived their lien by taking this personal judgment. A lien once established, the burden is upon the owner of the estate charged to show its relinquishment, and, while this may be inferred from circumstances, it may also be rebutted. It is said by at least one author that "the question of waiver is always one of intention": *Adams' Equity*, 128, 129. If so, it is necessarily one of fact: *Cordova v. Hood*, 17 Wall. 1, 9; *Coit v. Fougere*, 36 Barb. 195. In this case there is nothing to show such intention. True, a personal judgment was taken, but it was accompanied by acts which clearly show an intention to preserve, rather than to relinquish, the lien; and no effort has been made to collect the judgment by the ordinary process of the court. It cannot be successfully contended that the taking of the judgment, alone, would have such effect. Many cases hold that the substitution of one form of personal liability for another leaves the lien unaffected: *Cordova v. Hood*, 17 Wall. 1; *Fish v. Howland*, 1 Paige, 20; *Warner v. Van Al-*

tynes, 3 Paige, 513; *Shirley v. Congress etc. Sugar Refinery*, 2 Edw. Ch. 505; *Vail v. Foster*, 4 N. Y. 812; *Blackburne v. Gregson*, 1 Cox, 90; *Mackreth v. Symmons*, 15 Ves. 829; *Garrison v. Green*, 1 Johns. Ch. 808; *Ex parte Loaring*, 2 Rose, 79; *Tardiff v. Scrugan*, 1 Bro. C. C. 423. Certainly, in this case, when complainant had full notice of the lien, and the judgment was taken under circumstances clearly showing an intention to preserve and rely upon it, the defendants should not be held to have waived their rights.

Having reached the conclusion that defendants' lien attached at the time that they furnished the material for Atkinson, it logically follows that, as against complainant, it existed as a valid charge upon the land, at the time the bill was filed; and the assignment subsequently made cuts no figure in the case.

The decree will be affirmed, with costs of both courts.

The other justices concurred.

MECHANIC'S LIEN—NECESSITY FOR FILING CLAIM.—The mere fact that materials are furnished or work done does not alone create a lien where the statute provides that the lien may be acquired by filing a notice in the recorder's office: *Green v. Green*, 16 Ind. 253; 79 Am. Dec. 428, and note; *Millsap v. Ball*, 30 Neb. 728. It is essential in cases governed by the statute concerning mechanics that notice be given the owner of property against which a lien for materials furnished is sought to be taken: *Shafer v. Archbold*, 116 Ind. 29. See also *Hanes v. Wadey*, 73 Mich. 178, and *Koepts v. Dyer*, 80 Mich. 311.

MECHANIC'S LIEN—VESTED RIGHTS—STATUTES AFFECTING.—The right to a mechanic's lien becomes vested at the time the material is furnished and this right cannot be affected by statute: *Goadbub v. Hornung*, 127 Ind. 181. A mechanic's lien law enacted for the purpose of enabling strangers to the title to land to subject it to a sale for obligations to which the owner never became bound is unconstitutional and leaves the law as it was before its passage: *John Spry Lumber Co. v. Sault Ste. Bank etc. Co.*, 77 Mich. 199; 18 Am. St. Rep. 396, and note.

MECHANIC'S LIEN—WAIVER BY TAKING PERSONAL JUDGMENT.—A mechanic's lien is not waived by causing an attachment to be issued and levied upon the property of the debtor to secure the same demand, as the remedies are cumulative and may be pursued at the same time: *Brennan v. Swasey*, 16 Cal. 140; 76 Am. Dec. 507, and note. In an action to foreclose a mechanic's lien there can be no personal judgment where the lien fails: *Hilderbrandt v. Savage*, 4 Wash. 524; *Eisenbeis v. Wakeman*, 3 Wash. 534. The lien is waived by including in the judgment on the lien claim, a claim to which no lien attached: *McCrillis v. Wilson*, 34 Me. 286; 56 Am. Dec. 655; *Perkins v. Pike*, 42 Me. 141; 66 Am. Dec. 267. See also the extended note to *Goble v. Gale*, 41 Am. Dec. 221, on the waiver of mechanics' liens.

WARREN v. HOLBROOK.

[95 MICHIGAN, 185.]

ACCOUNTING BY FIDUCIARY.—COURTS OF EQUITY HAVE JURISDICTION to compel an accounting when fiduciary relations exist or fraud is charged, although the complainant has an adequate remedy at law.

ACCOUNTING BY FIDUCIARY—JURISDICTION—ELECTION OF REMEDIES.—An agent or employee whose duty it is to keep a true and accurate account of all moneys received, and to account therefor to his employer, occupies a fiduciary position. If he retains all or a portion of such funds he commits a breach of trust, the extent of which is peculiarly within his knowledge. In such a case the employer has a choice of remedies, and may maintain an action at law by attachment or garnishment, or may proceed in equity for an accounting and pursue the fund, and the fact that the acts complained of impute to the defendant a criminal offense and that, if he were compelled to render an account, evidence might be produced forming the basis of a criminal accusation, do not oust the court of jurisdiction.

ACCOUNTING—BREACH OF TRUST—EVIDENCE.—When in a civil action for an accounting by a fiduciary agent for moneys which it is alleged he has received and for which he has failed to account, a large amount of money is found in his possession including a small sum which is all that it is proved he has taken, and it is within his power to show where the remainder of the money was obtained if it was not taken from his principal, his failure to testify or to make such showing in his own behalf must be construed most strongly against him.

Champion and Champion, and Alfred Russell, for the appellant.

J. B. Shipman and H. H. Barlow, for the appellee.

GRANT, J. Complainant kept an hotel and saloon in the city of Coldwater. Defendant Holbrook was his bartender from December 1, 1889, to January 19, 1891. Complainant claimed a shrinkage in his hotel receipts, and suspected Holbrook of appropriating money from the saloon. The saloon was provided with a cash register having a bell, which was supposed to accurately register the receipts. January 19th he caused some silver dollars to be marked, and procured certain persons to make purchases of Holbrook at the bar, and give him in payment these marked dollars. He then caused a warrant to be issued for Holbrook's arrest, charging him with the crime of embezzlement. The arrest was made by defendant Sweet, who was sheriff of the county. Two of the marked dollars were found in defendant's pocket. At the same time, complainant caused a search warrant to be issued for two silver dollars. Acting under the authority of this search warrant, Sweet, with others, proceeded to the defend-

ant's house, and searched it. They there found \$1,084.62 in money, of which \$640 were in bills, in a pocketbook; \$335 in gold, in a cigar box; and \$109.62 in silver, in cigar boxes. Some articles of personal property, of trifling value, were also found, which were claimed by complainant. Sweet, by direction of the complainant, took possession of all this property.

Immediately thereafter complainant filed this bill, in which he charges that Holbrook had received a large sum of money, the precise amount of which he was unable to state, but which he averred to exceed fifteen hundred dollars, which he failed to pay over or to account for to him, and that he concealed and converted the same to his own use. The bill then alleged the facts in regard to the money in the hands of defendant Sweet; that complainant in equity had a lien on the fund in Sweet's possession; that Holbrook was insolvent, and threatened to commence suit against Sweet for the recovery of the money; and that complainant had no adequate remedy at law. The bill prayed for an accounting; that the fund in Sweet's hands be decreed to belong to the complainant; that Holbrook be enjoined from commencing an action at law for said fund; and that defendant Sweet be enjoined from paying over the same to him. Answer under oath was waived.

The defendant answered, without oath, denying the allegations in the bill charging him with appropriating complainant's money.

The case was heard in open court, and decree rendered for complainant for one thousand and sixty-six dollars and eighty cents, and defendant Sweet was decreed to pay this amount to complainant.

It is first contended that complainant's remedy at law is adequate and complete, and that, therefore, this bill cannot be maintained. Complainant might have maintained an action at law, and either attached or garnished the fund in the hands of Sweet. It requires no citation of authorities, however, to show that courts of equity have in many cases concurrent jurisdiction with courts of law. The general rule is that courts of equity have jurisdiction to compel an accounting where fiduciary relations exist, or fraud is charged: Story's Equity Jurisprudence, sec. 459; Pomeroy's Equity Jurisprudence, sec. 1421. Defendant Holbrook occupied a fiduciary relation to his employer. It was his duty to keep a true and accurate account of all the moneys received, and

to pay them over or account for them. If he failed to do this, the funds retained by him became, in his hands, trust funds belonging to complainant. He is charged with a breach of his trust, which is clearly shown. Its extent is peculiarly within his knowledge. In such case choice of remedies is with the party aggrieved, and he may proceed in equity for an accounting, and pursue the fund: *Darrah v. Boyce*, 62 Mich. 480; *Wyckoff v. Victor Sewing Machine Co.*, 43 Mich. 809; *Pierce v. Holzer*, 65 Mich. 264; *Clarke v. Pierce*, 52 Mich. 157.

The fact that the acts complained of impute to the defendant the commission of a criminal offense, and that, if he were compelled to render an account, evidence might be produced forming the basis of a criminal accusation, does not oust the court of jurisdiction. This is a purely civil proceeding, and the only questions are, did Holbrook retain money belonging to his employer? And, if he did, how much? He could not, of course, be compelled to discover any facts tending to criminate himself, but this does not prevent the trial of the issue made by the pleadings under the rules of evidence in civil actions: *Story's Equity Pleading*, sec. 525.

The most difficult question is whether the complainant has made a case entitling him to relief upon the merits. None of the money found in defendant's house was identified as the money received from the saloon. Aside from this money, the defendant's insolvency is admitted. His wife died before he was employed by complainant. He employed a housekeeper at five dollars per week. His family consisted of four, besides himself. His compensation was thirty dollars per month. That he took the two marked dollars is conclusively proven. There was also proof that other small sums were taken, and that the cash register did not always ring when he received money. The amount and kind of money found in his house are significant.

Complainant testified that, after Holbrook left his employ, his receipts in the saloon for ten months and nine days were two thousand five hundred and seventy-one dollars and forty cents greater than during a similar period when Holbrook was there, while the volume of business appeared about the same, and this is the only tangible evidence from which the amount taken can be inferred. On the other hand, there is evidence to show that other persons had charge of the saloon while Holbrook was at his meals; that at times he had an

assistant; that sometimes complainant took money from the drawer without depositing slips therefor; that complainant gambled; that, after Holbrook left, the saloon was kept open on Sundays and after hours, contrary to law, which was not done while Holbrook was there; that no charge had ever before been made against him; that he possessed no bad habits; that he was economical and bore a good reputation. His housekeeper, who was employed by him before he entered complainant's service, testified that he had money when she went there; but she does not say how much, nor testify as to her source of knowledge. The evidence is voluminous, and many witnesses were sworn. The circuit judge saw the witnesses, and could better judge of the credit to be given them than we can. The fair conclusion from the record is, as found by the circuit judge, that Holbrook kept money belonging to his employer, though the amount positively proved to have been taken is small. It was impossible for him to support his family upon the amount of his compensation. It was within his power to show where the money found was obtained, and to relieve himself from liability, both civil and criminal, if he had obtained the money from other sources. He chose to make no explanation, or to show what portion, if any, of the moneys found was not taken from complainant. His silence in a civil action must be construed most strongly against him. An honest man would, under such circumstances, be impelled to testify in his own behalf.

We think the conclusion of the circuit judge correct, and the decree must be affirmed with costs.

The other justices concurred.

FIDUCIARY RELATIONS—JURISDICTION OF EQUITY TO COMPEL ACCOUNTING BETWEEN THOSE OCCUPYING.—A court of equity has jurisdiction to compel a trustee to render an account of his proceedings under the trust: *Dole v. Olmstead*, 36 Ill. 150; 85 Am. Dec. 397, and note; *Smith v. Townshend*, 27 Md. 368; 92 Am. Dec. 637; or to compel a guardian to render an account to his ward: *Pratt v. Wright*, 13 Gratt. 175; 67 Am. Dec. 767; *Moore v. Hood*, 9 Rich. Eq. 311; 70 Am. Dec. 210; *Hall v. Hall*, 43 Ala. 488; 94 Am. Dec. 703, and note; or to compel the settlement of an account by an executor or administrator: *Green v. Creighton*, 10 Smedes & M. 159; 48 Am. Dec. 742, and note; *Mock v. Steele*, 34 Ala. 198; 73 Am. Dec. 455, and note; or to compel one partner to account to another where he seeks to appropriate partnership funds to himself: *Crescent Ins. Co. v. Bear*, 23 Fla. 50; 11 Am. St. Rep. 331. See *Sanborn v. Kittredge*, 20 Vt. 682, 50 Am. Dec. 58, in which it was held that equity has jurisdiction to compel an accounting, although an action at law might have been sustained where the bill seeks a

discovery, and the discovery is made by answers. See also note to *Paul v. McCarthy*, 8 Am. St. Rep. 684.

FIDUCIARY RELATIONS—ACCOUNTING BETWEEN THOSE OCCUPYING.—One partner may be compelled to account to his copartners for profits derived from clandestine dealings with third persons in fraud of his copartners: *Kilbourn v. Latta*, 5 Mack. 304; 60 Am. Rep. 373; note to *Jones v. Dexter*, 30 Am. Rep. 461. A voluntary trustee may be compelled to account for funds received by him as such: *Houscal v. Gibbs*, 1 Bail. Eq. 482; 23 Am. Dec. 186; *Van Epps v. Van Deusen*, 4 Paige, 64; 25 Am. Dec. 516, and note.

FIDUCIARY RELATIONS.—BURDEN OF PROOF rests on the party occupying fiduciary relations to show that the transaction between him and the person trusting him is fair and just: *Darlington's Estate*, 147 Pa. St. 624; 30 Am. St. Rep. 776, and note. A trustee's refusing to account furnishes a good reason for adopting against him the most rigid rule of calculation: *Myers v. Myers*, 2 McCord Ch. 214; 16 Am. Dec. 648.

MARKLEY v. WHITMAN.

[95 MICHIGAN, 286.]

ASSAULT—SCHOOL-FELLOWS—LIABILITY FOR "RUSHING."—When a student is passing quietly along the street on his way from school, and his fellow-students form in line behind him and "rush" him, each pushing the one in advance until he is reached, in which performance or play he does not participate, the one immediately behind him and who pushes him is guilty of an assault, and liable in damages for the injuries inflicted.

ASSAULT—RUSHING BY FELLOW-STUDENTS—DANGEROUS GAME.—The game of "rush" as played by fellow-students, the practice of which is to find some one in advance, when the others form in line, each in the rear pushing the one in advance until the one to be "rushed," who knows nothing of what is coming, is pushed by the one immediately in his rear, is dangerous, and constitutes an assault by the latter for which he is liable in damages. The student "rushed" has the same right of protection from such an assault as if he were a stranger.

A. A. Worthington, Alexander Emery, and George S. Clapp, for the appellant.

A. C. Roe, Spofford Tryon, and Edward Bacon, for the appellee.

LONG, J. Plaintiff and defendant were both students at the Buchanan high school. On February 7, 1890, while the plaintiff was on his way home from school, the defendant and others of the scholars were engaged in what is called a "rush" or "horse game." The practice of the game is to find some one in advance, when the others form in a line, each one in the rear pushing the one in advance of him, and so on through the line until the one to be "rushed," who knows nothing of

what is coming, is rushed upon by the one in his rear, and pushed or rushed. On the day in question the plaintiff, while going towards home on the sidewalk, was to be rushed. The defendant was in his immediate rear, and engaged in the game. When pushed he rushed upon the plaintiff, striking him with his hands between the shoulders with such violence that the plaintiff was thrown nearly to the ground. Immediately thereafter he lost his voice above a whisper, and has never recovered its use. His neck was nearly fractured, and for several months he was compelled to take medical treatment in Chicago. It is claimed that he suffered great pain, and has not fully recovered. This action was brought to recover for the injuries thus occasioned. On the trial in the court below the plaintiff had verdict and judgment for two thousand five hundred dollars. Defendant brings error.

The errors relied upon relate principally to the charge of the court. It was claimed on the trial in the court below:

1. That the push against the plaintiff was not an assault, and therefore not actionable.

2. That it was a pure accident.

3. That it was not a dangerous game, and the results which followed from the push could not have been anticipated.

4. That the defendant only put himself in a position ready to be pushed if the spirit of frolic should be entered into by those behind him, and his rush upon the plaintiff was neither invited nor approved.

5. That there was no unlawful intent to injure the plaintiff.

It is insisted that the court below in its charge entirely ignored the claim of the defendant made on the trial, and also that the plaintiff was one of the schoolfellows, and stood in a different position to the defendant than would a stranger. The court instructed the jury substantially that, if the plaintiff was participating in the play, or in any way contributed to the injury, he could not recover; that, to entitle the plaintiff to recover, he must show by a preponderance of evidence that the injury was occasioned by the push given by the defendant, and that the defendant either willfully pushed the plaintiff, or was voluntarily engaged in the game, which must be found to be dangerous, and one reasonably calculated to be dangerous to innocent persons lawfully traveling along the sidewalk upon which the play was conducted. The court below further instructed the jury as follows:

"If the game in question was a dangerous one to indulge in on the street and at the time in question, and if the defendant was voluntarily engaged in such play at the time of the accident, and if the plaintiff was not participating in such sport, and was not guilty of conduct which in any way contributed to the injury, but, on the contrary, was lawfully traveling on the sidewalk, and in the exercise of reasonable care, and if the defendant, while so playing, pushed the plaintiff and injured him, he is liable; and in such case it is no excuse for him to say that he himself was pushed against the plaintiff by some other boy."

This charge fully protected the rights of the defendant, and was as favorable to him as the facts of the case warranted. In fact, on the trial it was little in dispute that the injury occurred exactly as the plaintiff claimed. He was peaceably walking along the street, and had no intimation that he was to be "rushed." He was not participating in the game, and, if his testimony is true, never had taken part in it, and on that occasion was not anticipating that he was the victim selected to be rushed. It was an assault upon him, and the court correctly stated the rules of law applicable to the case; at least, the defendant had no reason to complain. It is evident that the defendant was one of those engaged in the game, which, upon a bare statement of the manner in which it is to be played, must be regarded as dangerous. He voluntarily engaged in it, and his conduct occasioned the injury. It was unlawful to "rush" the plaintiff under the circumstances shown, and the defendant must be held responsible for the consequences which followed. It may be, and probably is, true that those taking part in it did not anticipate the injurious effects upon the plaintiff; but that does not lessen the plaintiff's pain and suffering, or make the act less unlawful. The plaintiff while passing along the street and not engaged in the sport had the same right to be protected from such an assault as a stranger would have had, and the assault upon him was as unlawful as it would have been upon a stranger.

We find no error in the case, and the judgment must be affirmed with costs.

HOOKE, C. J., McGRATH and GRANT, JJ., concurred.

MONTGOMERY, J., did not sit.

ASSAULT—CIVIL LIABILITY FOR.—When a party, by an act which he could have avoided and which he cannot justify, inflicts an immediate injury on another by force he is liable in damages to the party injured: *Goldsmith v. Joy*, 61 Vt. 488; 15 Am. St. Rep. 923, and note. An assault involves every attempt or offer to do corporal hurt to another with force or violence: *Dress v. Comstock*, 57 Mich. 176; *Gillespie v. Beecher*, 85 Mich. 347. In an action for an assault it is not necessary to show an intent to harm the plaintiff. So, if one child kicks another in school after it has been called to order, the latter may recover for the resulting injuries, though there was no intent to harm him: *Voeberg v. Putney*, 80 Wis. 523; 27 Am. St. Rep. 47. So where one boy throws a piece of mortar at another boy and hits a third, he is liable in damages to the latter in an action for assault and battery: *Peterson v. Hafner*, 59 Ind. 130; 26 Am. Rep. 81, and note. See also *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76, and note.

GRAVES v. CITY OF BATTLE CREEK.

[95 MICHIGAN, 266.]

WITNESSES—EXPERT EVIDENCE—OPINION OF PHYSICIAN.—In an action to recover for personal injury, the opinion of a medical expert as to whether or not the condition of plaintiff's arm as alleged might co-exist with his ability to use it in the manner witnessed by the jury is admissible.

PERSONAL EXAMINATION OF PLAINTIFF—POWER OF COURT TO ORDER.—In an action to recover for personal injury, the court may require the plaintiff to submit to a personal examination by a physician, in the presence of the jury, of that portion of his body alleged to have been injured, when this can be done without shocking anyone's sense of delicacy; but wide discretion is vested in the trial court, which justifies a refusal to require the examination when the necessities of the case are not such as to call for it, or when the sense of delicacy of the plaintiff may be offended by the exhibition, or when the testimony would be merely cumulative, or in the judgment of the trial court, would not materially aid the jury.

NEGLIGENCE—WHEN QUESTION FOR JURY.—When, in an action to recover for personal injuries received from a fall over an obstruction in the streets of a city, the proof clearly shows that though the accident happened in the night-time, yet the street was well lighted, and that the party injured could have seen the obstruction if she had been looking for it, and her testimony shows that just before she stumbled over it she heard a whistle and became frightened and hurried on, the jury should determine the question whether or not this circumstance coupled with the fact that it was in the night-time is sufficient to excuse her immediate attention to the walk at the exact time of the injury.

Frank W. Clapp, for the appellant.

Hulbert and Mechem, for the appellee.

MONTGOMERY, J. The plaintiff recovered a verdict of five hundred dollars in an action on the case for an injury re-

ceived by a fall occasioned by a defective sidewalk. But four assignments of error are discussed in the defendant's brief, and under the settled practice of the court no other assignments can be considered.

The plaintiff appeared as a witness, and the jury observed her use of the injured arm and wrist. Dr. Alvord, a witness for the plaintiff, testified to its condition and the prospect of recovery, and was asked the following question:

"Doctor, is the fact that the plaintiff is able to use her arm in the ordinary ways, as it has appeared here, as she used it in this room, as you have seen her when she was in the witness chair, is that proof that the injury to the arm has subsided, and that there is no pain there?"

This was objected to, as calling for a conclusion of the witness as to the force of testimony in the case; but plaintiff's counsel then added:

"Is there any surgical proof? I do not mean legal proof, your honor."

The witness was permitted to answer the question as thus modified. The question as originally put may have been open to the objection urged, but as modified it called for the opinion of a medical expert upon the question of whether the condition alleged might co-exist with the fact of the plaintiff's ability to use her arm in the manner witnessed by the jury. There was no error in the ruling.

The sixth and seventh assignments of error are based upon the refusal of the court to direct the plaintiff below, at the request of defendant's counsel, to remove her glove from the injured hand, and exhibit the same to the jury, and upon a like refusal to direct the plaintiff below to submit her injured arm to a physician, Dr. Kimball, to be examined in the presence of the jury. Dr. Alvord, a witness for the plaintiff, had testified that there was a setoff to the bone, perceptible to the touch, which could be felt with the finger, and which could be shown to anybody. The court declined to require the plaintiff to exhibit her arm to the jury, or to submit to the examination, saying:

"The court in civil cases will allow counsel to take such course as they please. The court will not require it unless counsel choose to do it."

It will be observed that the exhibition of the arm at the point of the alleged fracture would not have been a shock to the plaintiff's sense of delicacy, and it will be also noted that

the court placed the ruling upon the want of power in the court to require the plaintiff to submit to the examination in question; so that the question presented is whether the court has the power to require such a submission by a plaintiff in a case under any circumstances. The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the court, under proper restrictions; the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination where the necessities of the case are not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, or where, in the judgment of the trial court, it would not materially aid the jury.

The power has been exercised in Iowa, Alabama, Arkansas, Georgia, Ohio, Missouri, Nebraska, Texas, Minnesota, Kansas, Wisconsin, and Indiana. Opposed to the rule in these states are the decisions of *Parker v. Enslow*, 102 Ill. 279; *Roberts v. Ogdensburgh R. R. Co.*, 29 Hun, 154; and *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250. In the case of *Parker v. Enslow*, 102 Ill. 279, the question was not discussed beyond a bare statement of the holding, and no authority was cited; all that is said upon the subject being, "the court had no power to make or enforce such an order." The case of *Roberts v. Ogdensburgh R. R. Co.*, 29 Hun, 154, overrules a previous decision of the special term of the superior court of New York, and is not a decision of the court of last resort. Stress appears to have been laid in the decision upon the fact that the order which preceded the trial required the plaintiff to submit to answer any questions that should be put to her, and this was treated as particularly objectionable, although the court does hold that the court has no power to compel a party to submit to any bodily examination. The decision in *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, was concurred in by seven of the nine justices of the supreme court, Justices Brewer and Brown dissenting from the conclusion of the majority. This decision is entitled to very great weight, but, in view of the manifest justice of a requirement that the plaintiff in case of personal injury shall produce the best evidence attainable, we think this case should not be permitted to stem the otherwise almost unbroken current of authority upon the subject. It is true that the rule is one of modern

growth, but it is also true that actions for personal injury, while not of modern origin, are rapidly increasing, and are constantly presenting new questions. The rule is well recognized by substantially all the courts of the country that the injured party may exhibit his wounds to the jury in order to show their nature or extent, and that rule has been followed in this state. Testimony which is open to one party ought logically to be open to his opponent, if it can be obtained with due regard to decency, and in the orderly conduct of the trial. It is well stated by the court in *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 721, 14 Am. St. Rep. 190:

"This conclusion may be placed upon the higher ground that when a person appeals to the sovereign for justice he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. The conception of the nature and objects of a judicial trial which denies to the defendant, under proper safeguards, the right of such an inspection, is not higher than that of the old law, which would not even compel a party to produce a deed or private paper in a civil case, where it was intended to be used in evidence against him, a rule which the court of chancery invaded to prevent failures of justice, and which has almost entirely disappeared from modern civil jurisprudence." See also *White v. Milwaukee etc. R. R. Co.*, 61 Wis. 536; 50 Am. Rep. 154; *Miami etc. Turnpike Co. v. Baily*, 37 Ohio St. 104; *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764; *Schroeder v. Chicago etc. R. R. Co.*, 47 Iowa, 875; *Atchison etc. R. R. Co. v. Thul*, 29 Kan. 466; 44 Am. Rep. 659; *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169; 6 Am. St. Rep. 39; *Sibley v. Smith*, 46 Ark. 275; 55 Am. Rep. 584; *Stuart v. Havens*, 17 Neb. 211; *Hatfield v. St. Paul etc. R. R. Co.*, 33 Minn. 130; 53 Am. Rep. 14; *Hess v. Lowrey*, 122 Ind. 225; 17 Am. St. Rep. 355; *Missouri Pac. R. R. Co. v. Johnson*, 72 Tex. 95. The case of *Loyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509, cited by Mr. Justice Gray in *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, as sustaining the conclusion of the majority of the court, is not now the law of Missouri, as will be seen by a reference to *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169; 6 Am. St. Rep. 39. We think there was error in the ruling of the trial judge upon this point.

The ninth assignment of error is based upon the charge of the court. The charge contained the following:

“Was that walk plainly visible that night? Were lights so situated as to render it impossible for a person to walk along there, using the ordinary care which men usually do, without seeing it? If so, it was the same as though it was daylight; if not, then there is something for you to try to determine, whether the woman was using that degree of care which persons generally do use, and, notwithstanding that, suffered her injury through the fault of the city.”

It is claimed by the defendant that the undisputed testimony shows that there was an arc light one hundred and eighty-nine feet to the west, one three hundred and forty-four feet to the east, and one a short distance to the south; that the lights were burning that evening, and that the street was lighted; and that the proof showed that the plaintiff was not paying any attention to her walking at the time of the injury. We have examined the record, and discover no conflict in the testimony as to the fact that the electric lights were burning.

The court further said to the jury:

“If the street was so well lighted that the plaintiff would have seen the obstruction had she not been looking away, and paying no attention to her walking, then it would be carelessness.”

It is claimed by the defendant that the proofs conclusively show that the plaintiff could have seen the obstruction had she been looking for obstructions in the walk at the time of the injury. We think, under the proofs, this question should not have been submitted to the jury. The plaintiff's theory was, and she gave testimony tending to show, that just before she stumbled over the plank in question she heard a whistle, and became frightened and hurried on. This was the testimony tending to show her care. The court should have submitted to the jury the question of whether this circumstance, coupled with the fact that it was in the night-time, was sufficient to excuse her immediate attention to the walk at the exact time of the injury. It is contended by the defendant that the evidence conclusively showed want of care; but the case is very similar to that of *Dundas v. City of Lansing*, 75 Mich. 510, 13 Am. St. Rep. 466, where it is said:

“It is doubtless true, as plaintiff testified, that had she been at the time upon the lookout for this hole in the walk, she might have seen and avoided it; but the question is, Was she negligent, under all the circumstances and surroundings, in not seeing and avoiding it? The darkness of the night,

the storm, her anxiety to get home, are all circumstances that should be weighed as bearing upon her conduct upon that occasion. The question is not free from doubt, and when it is not it should be submitted to the jury."

We think the question in this case was one for the jury under proper instructions, but the question to be submitted was whether the circumstances were such as to excuse her attention to the defect in the walk at the time of the injury.

Judgment reversed, and a new trial ordered.

MCGRATH, LONG, and GRANT, JJ., concurred.

HOOKEB, C. J., did not sit.

PHYSICAL EXAMINATION—POWER OF COURT TO ORDER.—In *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65, and note, it is contended that it is in the discretion of the trial court to order the physical examination of one suing to recover for personal injuries; while in *McQuigan v. Delaware etc. R. R. Co.*, 129 N. Y. 50, 26 Am. St. Rep. 507, and the cases cited in the note thereto, it is held that a court has no power to make such an order.

NEGLIGENCE—WHEN A QUESTION FOR THE JURY: See *Berger v. Missouri Pac. Ry. Co.*, 112 Mo. 238; 34 Am. St. Rep. 379, and note with cases collected.

HAINES v. HAYDEN.

[95 MICHIGAN, 332.]

WILLS—UNDUE INFLUENCE—DECLARATIONS OF TESTATOR AS EVIDENCE.—

If a will is claimed to have been made under undue influence, declarations of the testator, both before and after its execution, may be given in evidence for the purpose of showing his state of mind. Subsequent declarations are admissible for the reason that the condition of mind ascertained at a date subsequent to the execution of the will may be presumed to have existed at a prior time.

WILLS—UNDUE INFLUENCE—DECLARATIONS OF TESTATOR—EVIDENCE TO REBUT PRESUMPTION ARISING FROM NONDESTRUCTION OF WILL.—Conditions and declarations of a testator subsequent to the execution of his will, and the continuous dominion over him of a person accused of exerting undue influence, are admissible in evidence for the purpose of weakening a presumption of the validity of the will to be drawn from its nondestruction during a period of ten years.

WILLS—UNDUE INFLUENCE—RETAINING WILL WITHOUT DESTRUCTION.—

When a will is attacked on the ground of undue influence in its execution, and the party alleged to have exerted such influence relies upon a presumption of the validity of such will arising from its nondestruction during a period of ten years, and offers in evidence declarations of the testator that the will had been made by him and cannot be broken, together with directions to resist any attempt to break it, such pre-

sumption and the inference arising from such evidence may be met and overcome by evidence showing that such nondestruction as well as such declarations and directions were made while under the same delusion or dominion as existed or was exerted when the will was made.

WILLS—UNDUE INFLUENCE—DECLARATIONS OF TESTATOR AS EVIDENCE.—If a will is attacked on the ground that it was executed under undue influence, declarations made by the testator subsequently to its execution are admissible in evidence to show that the influence exerted accomplished its improper purpose, and subjected the testator's will to that of the beneficiary, in the absence of such a change in the relation of the parties as renders such testimony inadmissible. In order to render such declarations admissible they need not have been made so near the date of the will as to be a part of the *res gesta*, when the fair inference from all the circumstances is that they truly represent the testator's state of mind at the time the will was made.

WILLS—UNDUE INFLUENCE—EVIDENCE.—FACTS AND CIRCUMSTANCES OCCURRING SUBSEQUENTLY to the execution of a will, and relating to the condition of the testator's mind, and the question of fraud and undue influence claimed to have been exercised over him are admissible in evidence to prove, by inference or otherwise, that the same conditions existed before and at the time of its execution as existed afterwards on these points.

WILLS—UNDUE INFLUENCE—EVIDENCE OF SENILE DECAY—DECLARATIONS OF TESTATOR.—If a will is attacked for undue influence in its execution, facts and circumstances, and declarations of the testator occurring subsequently to the execution of the will tending to show the state of his mind at the time it was executed, and the fact of undue influence, are not rendered incompetent or inadmissible by evidence showing that at the time of the execution of the will the testator was suffering from senile decay.

WILLS OBTAINED BY FRAUD OR UNDUE INFLUENCE IN THE FIRST INSTANCE ARE VOID, and no subsequent ratification will render them valid without a formal re-execution or republication.

WILLS—MENTAL INCOMPETENCY OF TESTATOR.—Monomania amounting to insanity upon a single subject possessed by a testator, as evidenced by an unequal and unnatural disposition of his property made by him in his will, and such as must avoid it, is such an insane delusion as renders him incapable of reasoning on that particular subject, and shows that he assumed to believe to be true that which has no foundation or reason in fact.

Dunham and Preston, Alfred Russell, and Blair, Kingsley and Klienhaus, for the appellant.

C. H. Gleason, Smiley, Smith, and Stevens, and Uhl and Crane, for the appellee.

MONTGOMERY, J. On the twenty-fifth day of June, 1891, James H. Brown died, at the age of eighty-four, leaving an estate amounting to about one hundred and sixty thousand dollars. He had on the tenth day of February, 1881, executed in due form an instrument as and for his last will and testament,

which was duly admitted to probate in the probate court. On appeal to the circuit court of Kent county a contest was made on the two grounds of mental incapacity of the testator and undue influence exerted by the proponent, Margaret L. Haines.

The proponent and contestant are full sisters. At the time of the execution of the will the wife and mother was still living, and the natural objects of the testator's bounty were the aged and invalid wife, and the two sisters who are here litigants. When the will was made Mrs. Hayden was a resident of Denver, Colorado, and Mrs. Haines was a widow, her former husband, Mr. Rogers, having died in 1880. She continued to reside at Grandville, a few miles from the city of Grand Rapids, the testator's home. The will, as drawn, contained the following provision:

"I give and bequeath to my said daughter Margaretta L. Rogers ten thousand dollars, in trust for the benefit of my daughter Alice I. Hayden, wife of Charles Hayden, now living at Denver, in the state of Colorado, to be used by my said daughter Margaretta L. Rogers for the benefit and support and maintenance of my said daughter Alice I. Hayden during her natural life, after the death of the said Charles Hayden, her husband, and at any time when from personal injury or ill health he shall be unable to support his wife during his lifetime, and to be paid to the said Alice I. Hayden under the circumstances and upon the contingencies last above mentioned, in sums and at such times as in the judgment of my said daughter Margaretta L. Rogers the said Alice I. Hayden may need the same; and after the death of the said Alice I. Hayden I give and bequeath the said sum of ten thousand dollars, or what shall remain of the same at that time, to the said Margaretta L. Rogers, her heirs and assigns, forever."

The wife was given, in lieu of dower and statutory allowances, some small items of personal property in the house, and what money should be in the house at the time of the testator's death, the use of the homestead during her life, and a further provision of the will was a bequest of five thousand dollars to Margaret, in trust for the benefit of the wife during her life, the residue to go to Margaret. The remainder of the estate was bequeathed absolutely to Margaret, and she was named as one of the executors of the will. An agreement was drawn, bearing the same date, which provided that Hon.

J. W. Ransom was to act as managing executor, and account to Margaret. This agreement was signed by Margaret within a day or two of the execution of the will.

Both the question of undue influence and mental incapacity were submitted to the jury, and a general verdict against the will returned. The proponent appeals, and assigns error upon rulings as to the admissibility of testimony, upon the charge of the court, and upon the refusal of the court to charge as requested. The assignments number four hundred and twenty-nine. Many of them have been abandoned, and such others of them as we think important can be grouped in a manner which will lead to an understanding of the questions involved.

It is first contended that there was no testimony in the case having a legitimate tendency to show that the testator was mentally unsound at the time of the execution of the will, in 1881, or that he was a monomaniac upon the subject of Alice's legitimacy; and in this connection it is urged that the two theories of contestant, namely, that the deceased was possessed of an insane delusion on the subject, and that Margaret had so poisoned her father's mind as to induce belief in her false claim as to Alice's legitimacy, are at variance. It is claimed that, even if there was evidence of insane delusion, yet under the instructions of the court the jury were permitted to treat a mistake of fact induced by false evidence as amounting to a delusion. It is also claimed that the court erred in allowing too wide a range to contestant in the introduction of testimony as to the declarations of the testator after the making of the will, and that such inquiry should be limited to a period so near the date of the execution as to form a part of the *res gestæ*. It is also claimed that subsequent facts and circumstances were introduced, and that these were incompetent. It is contended that even if the testimony tending to show subsequent evil influences be admissible to rebut an inference of subsequent ratification, or to overcome an inference in favor of freedom of action, to be drawn from the fact that the will was not destroyed, yet such testimony is not competent to be considered by the jury as tending to prove the original exercise of undue influence, and that in the present case the jury were permitted to consider it for that purpose and for all purposes; and also that changed conditions rendered the testimony incompetent to prove by inference undue influence.

The case as made out by the contestant was most extra-

ordinary. The contestant's theory is that, when this instrument was made, Mr. Brown had become possessed of the notion that Alice was not his daughter, and that this idea was either an insane delusion, or that such belief was induced by the proponent, who had, with the purpose of inducing him to disinherit her sister, poisoned her father's mind by concocting a story to the effect that many years before, and within a year prior to the birth of Alice, while the family resided at Adrian, she (Margaret), upon returning from school one day, discovered her mother and one Dr. Hoyt lying on the bed together in a compromising position.

The evidence offered on behalf of contestant tended to show that the testator, up to and during the year 1880, the occasion of her last visit home prior to the making of the will, was very affectionate towards her, and that she was apparently his favorite as between the two daughters; that, prior to the time of making the will, deceased had repeatedly declared that he did not intend to make a will, and, in effect, that he expected his property to go to his children in equal parts; that, on the occasion of the visit at Grand Rapids in 1880 she, in a confidential conversation with her sister, stated that she hoped her mother would outlive her father, as her father would be likely to marry again, and she thought her mother would not; that in this same conversation the proponent told contestant that her father was an unchaste man, that he had been intimate with two of her aunts, and also that her mother was unchaste, that she had been criminally intimate with Dr. Hoyt, and that she (Alice) was the daughter of Dr. Hoyt; that at about this time the deceased commenced to visit his daughter Margaret at Grandville more frequently than before, and that upon the occasion of these visits he would return to his home morose, sullen, and irritable, and would avoid the society of his wife; that he visited Margaret the Sunday before the will was made, and that, when he went to Mr. Ransom to have the will drawn, it was with the purpose of entirely disinheriting his daughter Alice; that he was only induced by Mr. Ransom to make for her the uncertain provision finally incorporated as above quoted; that he afterwards told Mr. Ransom, under circumstances which may well lead to the inference that it was offered as explanatory of the terms of the will, that Alice was not his daughter; that no other source is shown for the origin of this story than Margaret; that Margaret herself testified in the probate court that she did, within

a year prior to Alice's birth, witness conduct on the part of her mother and Dr. Hoyt from which an inference of Alice's illegitimacy could fairly be drawn; that she denied having ever repeated the story except to her first husband, who died in 1880; and that the testator from this time on showed a coolness towards Alice, and avoided private conversation with her on her subsequent return to Grand Rapids; that on one occasion he asked her if she had told Margaret that she wished him dead; that she denied the story, and asked that she might be taken to Margaret, that she might deny the story to her, but her father dissuaded her; that Margaret often visited the city, and held conversations with her father outside of the house, and did not call upon her mother; that deceased said to others that Alice was not his daughter; and that Margaret afterwards did in fact tell her father the same thing repeatedly in the presence of Mr. Brown's nephew, who was his attendant in the later years of his life. Some of these facts were denied, but many of them stand uncontradicted on the record. Under these circumstances, the contestant claims that the notion of which Mr. Brown seemingly became possessed was either an insane delusion, or was created by Margaret with the purpose of inducing her father to disinherit Alice.

It is contended that these two positions are inconsistent. It is said in counsel's brief:

"If either is true, the other is not, under the special circumstances here presented, as neither good nor evil influence can be exercised over a crazy man on the very subject of his hallucination."

But, as was well said in *Woodbury v. Obear*, 7 Gray, 472, by Chief Justice Shaw:

"In the case of monomania and insane delusion, a person, by artful, false, and repeated surmises and insinuations, operating upon a sensitive and excitable mind of another, may foster and exasperate, if not create, an insane delusion, and at the same time, and by the same means, obtain such an influence over him as to induce him to make a will, or to do any other act which he would not have done but for the existence of the insane delusion, and the undue influence concurring with it."

In the present case the undue influence did not consist alone in the statement as to Alice's illegitimacy, as is claimed by proponent, but other untruthful statements are claimed to

have been made reflecting on her. But in any view it does not lie with Margaret to assert that the contestant's theory removed the question of mental delusion from the case. Contestant proved that the deceased did become possessed with the belief that Alice was not his child. The only source from which any evidence, convincing or otherwise, could have been derived, so far as this case shows, was Margaret, and she on oath denied having communicated it to anyone who could in turn communicate it to her father at a time when the effect produced could have followed. If her story was true, there was strong evidence to show the existence of delusion, and she cannot predicate error on the assumption of its falsity; but if it fails, an inference equally strong that she made use of this story with her father arises.

Was there any testimony tending to show the existence of the insane delusion at the time of the making of this will? It is conceded that the theory of Alice's illegitimacy and Mrs. Brown's infidelity are unfounded in fact, and Margaret, the only person who has raised a fair suspicion of Alice's illegitimacy, denies having communicated the circumstance, known only to her, to her father. We have, then, a case here of a father, thirty-five years after the birth of his child, whom he has always treated as his own, and with marked affection, conceiving all at once that she is a bastard. It is true that there is no evidence of the testator's prior declaration to this effect, but there is the fact that he practically disinherited her, and the further fact that he afterwards told his confidential advisor, who drew the will, that she was not his child, under circumstances fairly justifying an inference that he gave this statement to Mr. Ransom in explanation of his unnatural purpose to disinherit her. These and other similar declarations made after the making of the will were competent to show the existence of the delusion at that time. The rule is well settled that evidence of declarations of the testator both before and after the making of the will may be given for the purpose of showing the state of mind of the testator. Subsequent declarations are admissible for the reason that the condition of mind ascertained at a date subsequent to the execution of the will may be presumed to have existed at a prior time: *Waterman v. Whitney*, 11 N. Y. 157; 62 Am. Dec. 71; *Beaubien v. Cicotte*, 12 Mich. 459; *Harring v. Allen*, 25 Mich. 505; *Mooney v. Olsen*, 22 Kan. 69.

The testimony relating to the subsequent conditions and

declarations of the testator, and the continuous dominion over him, was admissible for the purpose of weakening the presumption of the validity of the will to be drawn from its non-destruction during the period of ten years. The proponent relied upon this presumption, and also offered testimony tending to show the declarations by the testator that this will had been made by him and could not be broken, and evidence of directions to Margaret to resist any attempt to break the will to the utmost. It was clearly competent to meet this inference as well by this affirmative showing as by testimony to show that such nondestruction, as well as such affirmative directions, were made while under the same delusion or dominion as existed or was exerted when the will was made.

Is evidence of subsequent declaration admissible as tending to show the fact that the influence exerted accomplished its improper purpose, and subjected the testator's will to that of the beneficiary? It is difficult to perceive why, on principle, such testimony is not to be received for this purpose. The state of the testator's mind at the very time of the execution of the will is, it is of course clear, the question to be solved; but it very rarely occurs that this state of mind can be shown by declarations made at the very moment of the execution of the will. To use the contestant's theory in this case as an illustration, we find Mr. Brown suddenly growing cool towards his favorite daughter; we find him possessed of the belief in her illegitimacy—a belief engendered by Margaret, as the only person who had either the alleged data or the influence with him to induce such belief—while the relations between him and Margaret remained the same. While there is no material change in circumstances, he declares the existence of this belief in his mind. May this not be received as tending to show that he held this belief when he made the will? Counsel criticise the rule, as giving reflex action to such testimony. But if the existence of the insane delusion may thus be shown, why not the existence of a sane belief induced by fraud? The authorities sustain the ruling of the trial judge on this point: *Porter v. Throop*, 47 Mich. 313; *Beaubien v. Cicotte*, 12 Mich. 459.

It is strenuously insisted, however, that the present case is distinguishable from *Porter v. Throop*, 47 Mich. 313, in that the period covered by the subsequent testimony was longer in this case, and, further, that the circumstances in the *Porter* case remained the same, while in the present case they were

changed; that Margaret had remarried, and come to live with the father; that the mother had died; and that the testator's mind had become weakened. There cannot well be a middle ground between the doctrine held in some cases, that, to render such declarations admissible, they must be made so near the date of the will as to be a part of the *res gestæ*, and the rule to be deduced from *Beaubien v. Cicotte*, 12 Mich. 459, *Harring v. Allen*, 25 Mich. 505, and other Michigan cases, that such declarations are admissible in any case where the fair inference, from all the circumstances, is that they truly represent the testator's state of mind at the time the will was made. We think, under the circumstances of the present case, there was no such change in the relations of the parties as rendered such testimony inadmissible. The testimony offered by the contestant tended strongly to show that Margaret's dominion over her father began in 1880, and was continued down to the time of his death.

The most serious question in this case is whether such testimony was admissible for the purpose of showing that the will was induced by fraud and undue influence exerted at the time. It is the theory of the contestant that the belief in her illegitimacy had been induced before the will was made; that this belief was kept alive by Margaret from that time on; that all these transactions were connected so closely as to constitute really one continuous effort by Margaret to create and to fan and to keep alive this belief to her profit, by first causing the will to be made, and by thereafter preventing its revocation by the same means; and that all that was done in this regard was simply in furtherance of one fraudulent scheme, which related, not only to the inducing of the will, but the prevention of its revocation.

In *Cook v. Perry*, 43 Mich. 626, Cook was charged with having made fraudulent representations as to the character and ownership of certain lands. Evidence was offered of subsequent statements made by Cook, which constituted substantially a repetition of the representations previously made, and which were relied upon as evidence of fraud. The court say:

"It is obvious that it could not be used as substantive proof of the alleged false statements constituting the fraud and causing the injurious result. The mischief had been done, and it could not possibly be charged to subsequent falsehoods. But evidence which is not admissible for one purpose is often

lawful for another, and it is not uncommon to make proof of matters occurring after the consummation of the wrong in order to identify the agency which produced it, or fortify the antecedent indications."

In the present case all the facts and circumstances occurring after the making of the will were facts and circumstances with which Margaret was connected, and were admissible as tending to identify the agency which produced the original result, and as tending to fortify antecedent indications.

The case of *Porter v. Throop*, 47 Mich. 813, is also instructive upon this point. In that case the fact of undue influence in procuring the will was established in the main by testimony showing the subsequent facts and circumstances with which the party concerned in exerting the undue influence was connected. In fact, the circumstance chiefly relied upon by Mr. Justice Cooley, in reaching the conclusion that there was undue influence, occurred two years after the will was made. This decision has been vigorously criticised by counsel, but the case was ably argued by eminent counsel, and was undoubtedly given the usual profound consideration accorded to cases written by Mr. Justice Cooley, and we should hesitate long to overthrow the doctrine of the case. We think the doctrine of *Porter v. Throop*, 47 Mich. 813, is but an application of the general rules adopted in numerous decisions in this State relating to what is requisite as proof of fraud.

In *O'Donnell v. Segar*, 25 Mich. 867, 878, Christiancy, C. J., said:

"The jury were told they could not infer fraud, and that it could not rest upon implication. We know of no such rule of evidence in reference to the question of fraud. It is, like any other fact, to be proved by any facts and circumstances which satisfy the mind of its existence, and may be, and generally is (when found), inferred from circumstances, and cannot often be proved in any other way."

In *Ross v. Miner*, 67 Mich. 410, 412, it is said by Mr. Justice Morse:

"Fraud is seldom capable of direct proof. It must be established by facts and circumstances taken together, and the natural inferences to be drawn therefrom, which will satisfy the ordinary unbiased man, either as a juror or outside the jury-box, that it exists."

In *Prentis v. Bates*, 93 Mich. 239, it was said:

"We think this court has never evinced the purpose of creating one rule of evidence which shall apply in will cases, but which is not to be adopted in any other."

The charge of the learned circuit judge upon that subject was as follows:

"If, however, you find that the will was valid at the time of its execution, it remained valid and is valid now, unless it has been revoked, which is not claimed by the contestant. The condition of the mind of the testator, nor any undue influence exercised over him after the execution of the will, could not invalidate it, and no such claim is made in this case. The law permits, however, the facts and circumstances occurring after the execution of the will to be shown relating to the condition of the testator's mind, and the question of fraud and undue influence claimed to have been exercised over him, for the purpose of proving, by inference or otherwise, that the same conditions existed before and at the time of the execution of the will as existed afterwards on these points."

We think this charge comes within the ruling of the case of *Porter v. Throop*, 47 Mich. 313, and should be sustained.

It is urged that the evidence shows that the testator was suffering senile decay, and that this fact renders incompetent much of the testimony relating to subsequent facts and circumstances and subsequent declarations, tending to show the state of mind of the testator at the time of making the will, and the fact of undue influence. The record discloses that there was a gradual weakening of mental power of the testator after the making of the will, and it is claimed by the contestant that this weakening antedated the making of the will, and that the testimony was sufficient to justify a finding to that effect. Did this fact of senile decay render testimony relating to subsequent acts or declarations inadmissible? The cases relied upon to support the contention of the proponent are *Rusling v. Rusling*, 36 N. J. Eq. 603; *Herster v. Herster*, 122 Pa. St. 239; 9 Am. St. Rep. 95; *Shailer v. Bumstead*, 99 Mass. 112.

In *Shailer v. Bumstead*, 99 Mass. 112, the will was made in April, 1853. The contestant offered to show that in July, 1854, the testatrix was suffering from paralysis. This was excluded as being too remote, and not tending to show her mental condition in 1853. The court say of this ruling:

"To a great extent it must be left to the presiding judge to determine, upon the facts before him, how far evidence of this description may have a tendency to throw light on the fact to be found, namely, the actual condition at the date of the will. . . . We do not perceive any reason to differ from the judge in the limit here applied. After July, 1854, her mental condition must have been greatly changed. Her advanced age, and the paralysis with which she was at that time seized, seem to make that period a proper limit for the evidence offered."

It will be seen that this was not a case of progressive decay, but that the intervening fact, namely, the attack of paralysis, was deemed of controlling effect.

We quote from *Rusling v. Rusling*, 86 N. J. Eq. 608, all that is said by the court on that subject:

"More than two years after this will was signed the contestant's son was invited by his father to visit him, and during the visit the testator expressed dissatisfaction with his will, and a desire to change it. An altercation then arose among the sons in their father's presence, and, after an interview apart with the two favored sons, the testator said he could not have this trouble, and the will must remain as it was. Aside from the denial, on the part of the proponents, that such an occurrence took place, we think that it is not to be inferred, from this instance of acquiescence by the testator, that his will, made so long before, was the offspring of these sons' influence. The evidence makes it quite plain that, at this later date, senile decay had made considerable inroads upon the testator's mind, and its operations then are not reliable *indicia* of what they might have been when the will was executed."

The court in that case is weighing the evidence—something we do not, under our practice, possess the power to do. The implication from the whole case is not that this testimony was incompetent, but that it was insufficient to satisfy the court. An examination of the case shows that the first question determined is the power of the court to go into the evidence, and after determining this, the court proceeds to weigh the evidence, and announces a conclusion on the facts.

The case of *Herster v. Herster*, 122 Pa. St. 239, 9 Am. St. Rep. 95, was also determined upon its facts, the court deeming the evidence sufficient, and approving a rule for the guidance of the court in such cases, stated as follows:

"If the testimony is such that after a fair and impartial trial, resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence, it cannot be said that a dispute, within the meaning of the act, has arisen."

The case cannot be deemed authority in this state, from the fact that this court exercises no such control over verdicts of juries as it is manifest from this opinion that the supreme court of Pennsylvania assumes under their practice. But, upon the subject of the effect of senile decay as affecting the admissibility of testimony, some language of the court is pertinent, and it does not tend to support the contention of proponent here. We quote:

"The limitations which govern the admission of this quality of evidence must depend largely on the character of the unsoundness attempted to be proved. There are types of mental unsoundness which appear suddenly, and may be of short duration, and in such cases the proof, to be of any avail, must come near to the precise time when the act was performed; but the decadence of old age, and many forms of mental derangement and imbecility, are of slow advancement, and proof of their distinct development at any given period will afford pretty clear ground to infer their existence for a long period, either before or after, with a considerable degree of certainty."

Complaint is made of an instruction of the circuit judge to the effect that if the will was obtained by fraud in the first instance it was then void, and that it continued to be void, and that no subsequent ratification would be good for anything without a formal re-execution or republication of the document. We think there was no error in this instruction. Evidence of the statements of the testator acknowledging the will were competent as bearing upon the question of whether the will was in fact executed freely at the time it was made, and was admitted by the circuit judge for this purpose; but, if invalid at the time of its execution, nothing short of a republication would make it valid. This question was directly ruled in *Chaddick v. Haley*, 81 Tex. 617. See also *Lamb v. Girtman*, 26 Ga. 625.

The claim of proponent that the charge upon the subject of mental delusion was such as to leave it open to the jury to infer that a mere mistake of fact might amount to delusion is

based upon that portion of the charge of the court in which it was said:

"If you shall find as matter of fact that, at the time the will in question was executed, the testator was laboring under an insane delusion or mania, from whatever source he may have derived it, that this story was true; that he came to believe it was true, and acted upon that belief; and that it was the cause of his making the unequal disposition of his property evidenced by the terms of the will, as between his wife and daughter; when, in fact, the whole story was false, and had no reason or probability for its foundation, then I charge you that that was such a mental delusion or mental derangement as would avoid the will."

We think, in view of what was further said in the charge upon the subject of insane delusion, that this instruction could not have misled the jury. The court further charged the jury:

"Monomania is insanity upon a single subject. It is an insane delusion which renders the person afflicted incapable of reasoning on that particular subject; he assumes to believe that to be true which has no foundation or reason in fact on which to found his belief."

Again:

"A person persistently believing supposed facts which have no real existence, against all evidence and probability, and conducting himself upon an assumption of their existence, is, so far as such facts are concerned, under an insane delusion."

We think these instructions correctly embodied the law upon the subject, and were well calculated to correct any misapprehension which might arise upon the instruction first quoted.

We are convinced, by a careful examination of the whole case, that there was no material error committed to the prejudice of the proponent, and that there was ample testimony to justify the verdict of the jury.

The judgment will be affirmed.

The other justices concurred.

WILLS—CONTESTING FOR UNDUE INFLUENCE—DECLARATIONS OF TESTATOR.—This question is thoroughly discussed in the monographic notes to *In re Hess's Will*, 31 Am. St. Rep. 690, and *Jackson v. Kniffen*, 3 Am. Dec. 395. See also *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552, and *Lane v. Moore*, 151 Mass. 87; 21 Am. St. Rep. 430.

WILLS—EFFECT OF INSANE DELUSION OF TESTATOR.—A will is invalidated by a delusion, when it is the result of the delusion, but not otherwise:

Lucas v. Parsons, 24 Ga. 640; 71 Am. Dec. 147, and note; *Cotton v. Ulmer*, 45 Ala. 378; 6 Am. Rep. 703; *Potts v. House*, 6 Ga. 324; 50 Am. Dec. 322, and note. But if the delusion was not present influencing the testator when he made the will, the will is valid: *Potter v. Jones*, 20 Or. 391.

WILLS—CONTESTING FOR UNDUE INFLUENCE—EVIDENCE—CIRCUMSTANCES; See extended note to *In re Hess's Will*, 31 Am. St. Rep. 688.

CITY OF DETROIT v. FORT WAYNE AND BELLE ISLE RAILWAY COMPANY.

[95 MICHIGAN, 456.]

STREET RAILWAYS—MUNICIPAL CONTROL—ORDINANCE CONCERNING SALE OF TICKETS.—The rights and franchises of a street railroad company are not destroyed or unreasonably impaired by a city ordinance requiring it to sell tickets to all persons applying therefor on each of its cars and to be good for transportation over its entire route or any portion thereof, traveling continuously either way between certain hours at the rate of eight tickets for twenty-five cents. Such ordinance may provide for its enforcement by making each day's neglect to comply therewith an offense punishable by fine, and authorizing the collection of such fine in an action at law.

STREET RAILWAYS—MUNICIPAL CONTROL UNDER RESERVATION IN ORDINANCE.—If the municipal ordinance under which a street railroad is operating contains a reservation of the right "to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public" the right is reserved to enact an ordinance providing that the railway company shall, for the accommodation of the public, keep tickets for sale upon the cars. It cannot be contended that the relation created by the first ordinance was contractual, and at the same time that the reservation was of the right to enact police regulations only. The right to exercise police power exists independent of the reservation, and cannot be bartered away. The contract relation created by such ordinance is not unilateral nor intended as a shield for the railway company alone.

STREET RAILWAYS—MUNICIPAL CONTROL—CONSTITUTIONAL LAW.—When power is conferred by statute upon a municipality to refuse its consent to the operation of a street railway in its street, its right is absolute and its power, in the first instance, to impose conditions, is unlimited, and the nature of the conditions imposed does not depend upon other grants of power. Respecting the imposition of further conditions after consent given, it is only necessary that the municipality keep within the scope of the reservations retained.

MUNICIPAL CORPORATIONS—CONSTRUCTION OF ORDINANCES.—When a municipal ordinance is good in part and bad in part, it is only necessary, in order to maintain the ordinance, that the valid and invalid parts be so distinct and independent, that the invalid may be eliminated, and what remains contain all the essentials of a complete ordinance.

MUNICIPAL CORPORATIONS.—ORDINANCES CONTAINING GRANTS may partake of the nature of contracts, yet they are none the less by-laws, and have

the force and effect, in favor of the municipality, and against persons bound thereby, of laws passed by the legislature of the state. The power to enact them involves all the incidents necessary to give effect thereto.

MUNICIPAL CORPORATIONS—RIGHT TO ENFORCE ORDINANCES BY FINE.—

Irrespective of statutory authority a municipality has implied power to provide for the enforcement of its ordinances by the imposition of reasonable and proper fines.

MUNICIPAL CORPORATIONS—RIGHT TO ENFORCE ORDINANCES BY FINE.—

The reservation in an ordinance of the right to impose further conditions involves the right to provide for the enforcement of such conditions by the imposition of reasonable and proper fines.

John J. Speed, for the relator.

Edwin F. Conely and Orla. B. Taylor, for the respondent.

McGRATH, J. Respondent, by virtue of an ordinance adopted in 1865, is operating a street railway in the city of Detroit, and this is an application for a *mandamus* to compel it to comply with the provisions of an ordinance enacted in January, 1893, requiring it to "issue and sell by its conductors or other duly authorized agents, to persons applying therefor, upon each and every car operated by said company within the limits of the city of Detroit, tickets, to be good for transportation over the entire route of said company, or any portion thereof, traveling continuously either way between" certain hours, at the rate of eight tickets for twenty-five cents. The ordinance contains separate sections making each day's neglect to comply therewith an offense punishable by fine, and providing for the collection of such fine in action at law.

Respondent, as assignee of the Fort Wayne and Elmwood Railway Company, is operating a street railway under an ordinance passed January 31, 1865, and the amendments thereto since enacted. The rate of fare was originally fixed at five cents, but by an amendatory ordinance passed in 1889 it was provided that said company should issue and sell tickets good for transportation between certain hours at the rate of eight tickets for twenty-five cents. Respondent accepted that ordinance, as it had those previously enacted. It, however, refuses to accept the ordinance enacted in January, 1893, or to comply with its terms. It answers that such tickets are kept for sale at certain places; that there are other street railway companies operating railways within the limits of the city of Detroit not regulated in respect of tickets by this or any other ordinance; and sets forth the

following reasons why it should not be compelled to comply with the provisions of the ordinance:

1. The company is furnishing the tickets in reasonable quantities and in reasonable places.

2. The ordinance is illegal and void in this:

(a.) That the common council of the city of Detroit has no authority to pass any such ordinance.

(b.) That the relations of the city of Detroit with the respondent are of a contractual nature, and the same cannot be in this regard enforced by penal ordinance.

(c.) That the ordinance seeks to regulate the internal and business affairs of the respondent.

(d.) That the ordinance is penal and invalid, because it undertakes to select one individual and punish him for a violation of it.

(e.) That the ordinance is unequal in its operation.

(f.) That the ordinance is not a proper exercise of the police power delegated to the municipality.

The Fort Wayne and Elmwood Railway Company was organized in February, 1865, under chapter 94 of Howell's Statutes. Said act was subject to amendment, and in 1867 the following section was added thereto:

"All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned, or held by them; provided that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe; provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and operating such railway in the street in such consent or grant named, pursuant to the terms thereof."

The ordinance of 1865, under which said company began operations, contained the following reservation, which is still in force:

"It is hereby reserved to the common council of the city of

Detroit the right to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railway."

In the absence of this reservation in the ordinance it could not be said that the rights and franchises of the respondent are destroyed or unreasonably impaired by the requirement sought to be enforced; but, independently of this statutory provision, the reservation contained in the ordinance itself, viz., "to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public," certainly includes the right to enact an ordinance providing that the company shall, for the accommodation of the public, keep tickets for sale upon its cars. Ordinances containing grants are construed liberally in favor of the public. It cannot be contended that the relation created by the ordinance is contractual, and at the same time that the reservation was of the right to enact police regulations only. The right to exercise police power exists independent of the reservation, and could not be bartered away. The contract is not unilateral, intended as a shield for respondent alone.

The right of the municipality, under the statute, to refuse its consent to the operation of a street railway in its streets is an absolute one, and its power, in the first instance, to impose conditions is unlimited. The nature of the conditions imposed does not depend upon other grants of power. Respecting the imposition of further conditions after consent given, it is only necessary that the municipality keep within the scope of the reservation.

In the recent case of *Sternberg v. State* (Neb., March 1, 1893) a similar ordinance was sustained under general provisions subjecting the company "to all reasonable regulations in the construction and use of said railway which may be imposed by ordinances," and empowering the municipality "to fix and determine the fare charged."

The court held that the power to fix rates of fare necessarily carried with it all incidents necessary to carry the power into effect; that "a street railway has no depots; its stations are the street corners, and its business with the public is conducted on its cars"; and that it was not unreasonable to require the company to sell its tickets at its place of doing business.

In *South Covington etc. Ry. Co. v. Berry* (Ky., March 19, 1892) it was held that an ordinance requiring a street car company to put a driver and a conductor on each car was a proper exercise of the city's police power, and not an impairment of the company's rights, not being unreasonable or oppressive: See also *Frankford etc. R. R. Co. v. Philadelphia*, 58 Pa. St. 119; 98 Am. Dec. 242.

In the present case the power exercised was that reserved in the original grant.

The only question that remains is whether or not the penal provisions of the ordinance can be sustained. Even if invalid the other provisions of the ordinance do not necessarily fall with them. It is well settled that an ordinance may be good in part, although bad in part. It is only necessary that the good and bad parts be so distinct and independent that the invalid parts may be eliminated, and that what remains contain all the essentials of a complete ordinance: *Dillon on Municipal Corporations*, sec. 421; *State v. Hardy*, 7 Neb. 377; *St. Louis v. St. Louis R. R. Co.*, 89 Mo. 44; 58 Am. Rep. 82; and 14 Mo. App. 221.

The general rule is that ordinances should be general in their nature and impartial in their operation. Ordinances, however, containing grants, are of necessity several and independent of each other. The conditions imposed and requirements exacted are necessarily different, depending upon many and varied considerations. These ordinances are adapted to these varying considerations and circumstances. An ordinance prohibiting a particular railroad corporation by name from running locomotives by steam on a specific street does not contravene the principle stated: *Railroad Co. v. Richmond*, 96 U. S. 521. It does not follow that a like reservation is contained in every other railway ordinance. While it is true that ordinances of this class have been held to partake of the nature of contracts, yet they are none the less by-laws, and have the force and effect, in favor of the municipality, and against persons bound thereby, of laws passed by the legislature of the state. The power to enact an ordinance involves all the incidents necessary to give effect thereto. The charter of the city of Detroit (section 142), empowers the common council to punish the violation of any ordinance by imposing a fine. Irrespective of this express authority, a municipality has an implied power to provide for the enforcement of its ordinances by reasonable and proper fines: 1 *Dillon on Muni-*

icipal Corporations, sec. 338. The reservation in an ordinance to impose further conditions involves the right to provide for the enforcement of conditions in the manner provided by law. The application of the rule contended for to this class of cases would prevent this method of enforcement of any condition imposed by virtue of a reservation of this character. The common council having the power to impose the condition in question by ordinance, it has, as incident thereto, the power to provide for its enforcement. The general rule above stated must be held to apply only to regulations the authority to enact which depends solely upon the exercise of police powers, and not to conditions imposed by an ordinance enacted by virtue of a reservation in a by-law which partakes of the character of a contract.

The ordinance is therefore valid, and the writ of *mandamus* must issue as prayed.

The other justices concurred.

STREET RAILWAYS—MUNICIPAL CONTROL.—A municipal corporation having the right to regulate the use of the streets over which the cars of a street railway company run has the power to impose such reasonable conditions upon the company's enjoyment of its franchises as in their judgment the interests of the public seem to require: *Hudson River Telephone Co. v. Water-vliet etc. Ry. Co.*, 135 N. Y. 393; 31 Am. St. Rep. 838, and note; *Mayor v. Dry Dock etc. R. R. Co.*, 133 N. Y. 104; 28 Am. St. Rep. 609, and note. The speed with which trains may move through the streets of a city is subject to municipal control: *Grube v. Missouri Pac. Ry. Co.*, 98 Mo. 330; 14 Am. St. Rep. 645 and note. A city may compel a railroad traversing a street to keep its track well watered: *City etc. Ry. Co. v. Mayor*, 77 Ga. 731; 4 Am. St. Rep. 106, and note.

MUNICIPAL CORPORATIONS—CONSTRUCTION OF ORDINANCES VOID IN PART. Void provisions in a municipal ordinance will not invalidate the whole ordinance if they can be separated from the rest of the ordinance without mutilating it: *People v. Armstrong*, 73 Mich. 288; 16 Am. St. Rep. 578, and note; *Magneau v. City of Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436.

MUNICIPAL CORPORATIONS—RIGHT TO ENFORCE ORDINANCES BY FINE AND IMPRISONMENT.—This question is discussed in *Ulrich v. St. Louis*, 112 Mo. 138; 34 Am. St. Rep. 372, and note; and the extended note to *Robinson v. Mayor*, 34 Am. Dec. 641. But in *Knoxville v. Chicago etc. R. R. Co.*, 83 Iowa, 636, 32 Am. St. Rep. 321, it was held that a municipal corporation has no authority to provide by ordinance for the punishment by fine of persons guilty of a nuisance, as defined by the ordinance, and see the note to this case.

CORBITT v. TIMMERMAN.

[95 MICHIGAN, 581.]

JUDGMENTS BASED ON ATTORNEY'S APPEARANCE.—It is presumed in favor of a judgment based on the appearance of an attorney that he is duly authorized to appear, even when such appearance is without service of process. In a collateral proceeding this presumption is conclusive.

JUDGMENTS RESTING UPON UNAUTHORIZED APPEARANCE OF ATTORNEYS WILL BE SET ASIDE upon motion. Equity will enjoin the collection of a judgment so procured, when the right to move to set it aside has been lost, regardless of the solvency or insolvency of the attorney.

JUDGMENT BASED ON APPEARANCE OF ATTORNEY—COLLATERAL ATTACK.—When, after process is served on one of two defendants who is an attorney, he appears for both, and judgment is rendered against them, after which the defendant not served fraudulently conveys all of his property subject to execution, he cannot, in an action brought to set aside such conveyance, attack the judgment on the ground of nonservice of process, and that the appearance of such attorney for him was unauthorized.

Frank G. Holmes, for the appellants.

D. E. Corbitt, *in pro. per.*, for the appellee.

GRANT, J. Complainant obtained a judgment in the circuit court for the county of Kent against the defendant Leonard Timmerman and William W. Taylor, and execution was duly issued thereon. The sheriff called upon Mr. Timmerman August 6th, and requested payment. Mr. Timmerman promised to call upon the officer a few days after. Instead, however, of keeping his promise he caused to be recorded, August 8th, a deed from himself to his wife of the premises in question, which constituted the only property Timmerman had upon which a levy could be made. A levy was made, and complainant filed a bill in chancery to set aside the conveyance as fraudulent. Decree was entered in favor of the complainant.

The conclusion reached by the court below, that the conveyance was fraudulent, is correct, and is fully sustained by the evidence.

The judgment at law is attacked on the ground that Mr. Timmerman was not served with process, and that he had authorized no attorney to appear for him. Mr. Taylor, the codefendant with Timmerman, was an attorney, and a member of the firm of Taylor and McBride, who appeared for the defendants in that suit. Service was made upon Taylor, and upon the same day Taylor and McBride entered their appearance, served notice thereof upon the plaintiff, who was his

own attorney, and four days thereafter filed and served a plea of the general issue, with notice of special matters of defense. After the appearance of the defendants by their attorneys no steps were taken to serve Timmerman with a copy of the declaration and notice to plead—the process by which suit was commenced.

The presumption is that attorneys are duly authorized to appear, even where there is an appearance without service of process: *Arnold v. Nye*, 23 Mich. 286. It is undoubtedly the general rule that a judgment resting upon the unauthorized appearance of an attorney will be set aside upon motion, and that equity will enjoin the collection of a judgment so procured when the right to move to set aside the judgment is lost. These remedies exist regardless of the solvency or insolvency of the attorney: 1 Black on Judgments, secs. 272, 325, 374. Had defendant Timmerman applied to the court to vacate the judgment the court should have set it aside upon satisfactory proof that the attorneys appeared without his authority, and that their action was not subsequently ratified by him.

The authorities are not uniform as to whether such judgment can be attacked collaterally. Freeman states the rule to be that “this presumption is, in a collateral proceeding, not merely *prima facie*; it is conclusive”: Freeman on Judgments, 2d ed., sec. 128.

In *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589, after a careful review of the authorities by Justice Rapallo, he says:

“It is established by a long line of decisions that where an attorney of the court appears for a party in an action, his appearance is recognized and his authority will be presumed to the extent, at least, of giving validity to the proceedings; . . . and for reasons of public policy the court will hold the appearance good, leaving the aggrieved party to his action against the attorney, granting relief against the judgment only in cases of direct application.”

We think this rule is founded in reason and good sense, and is supported by the clear weight of authority. It is the plain duty of a defendant, in such a case, upon receiving information of the judgment against him, to proceed promptly to have the judgment vacated. The rights of the parties can thus be most expeditiously and inexpensively determined. The presumption being that the appearance is authorized, the

plaintiff is justified in relying upon it. He is therefore guilty of no wrong, and is entitled to prompt action on the part of the defendant when he learns that an unauthorized judgment is rendered against him which is valid upon the face of the proceedings.

Decree is affirmed, with costs.

HOOKEK, C. J., McGRATH and LONG, JJ., concurred.

MONTGOMERY, J., did not sit.

ATTORNEY AND CLIENT—SETTING ASIDE JUDGMENT FOR UNAUTHORIZED APPEARANCE OF.—The appearance of an attorney, if unauthorized, is ground for vacating a judgment: *Winters v. Mears*, 25 Neb. 241; 13 Am. St. Rep. 489, and note; *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204, and note. Compare *Vilas v. Plattsburg etc. R. R. Co.*, 123 N. Y. 440; 20 Am. St. Rep. 771, and note; see extended note to *Burton v. Lyford*, 75 Am. Dec. 146.

ATTORNEY AND CLIENT—PRESUMPTION AS TO ATTORNEY'S AUTHORITY TO ACT: See *Williams v. Johnson*, 112 N. C. 424; 34 Am. St. Rep. 513, and note with cases collected; also extended note to *McAlexander v. Wright*, 16 Am. Dec. 98.

LUDEMAN v. HIRTH.

[98 MICHIGAN, 17.]

ERRORMENT—PLEADING AND PRACTICE.—It is error to deny plaintiff in ejectment the right to amend his complaint after issue joined by setting forth the estate claimed, and to deny him the right to submit to a nonsuit after the refusal to permit him to amend.

JUDGMENTS BARRED BY STATUTE OF LIMITATIONS.—If the right of action on a judgment is barred by the statute of limitations, execution cannot issue thereon, nor can a valid levy or sale be made thereunder.

EXECUTION LIENS—DELAY IN SALE.—A lien on land existing by virtue of a levy under execution is not lost by delay in proceeding to sale when no fraudulent purpose is shown on the part of the execution creditor. The lien remains in force until the statute of limitations has barred any right to proceed to foreclose it.

EXECUTION SALES AFTER JUDGMENT IS BARRED.—When proceedings to enforce the lien of an execution by sale are instituted before the right of action upon the judgment under which the execution issues is barred by the statute of limitations, they are valid, and the sale in pursuance thereof is legal.

George W. Radford and Edward A. Barnes, for the appellants.

William Look and H. F. Chipman, for the appellee.

GRANT, J. The declaration in this case was defective in that it did not set forth the estate which the plaintiffs claimed:

How. Stats., sec. 7797. No demurrer was interposed, but the defendant pleaded the general issue, with notice of the statute of limitations and a claim for improvements. Upon the trial plaintiffs asked leave to amend their declaration, setting forth the estate claimed. The court refused to permit the amendment. Thereupon plaintiffs asked leave to submit to a nonsuit, which was also denied, and the court directed a verdict for the defendant.

The plaintiffs claimed title under an execution sale. The judgment was rendered April 2, 1878, and execution issued and levy made on the same day. On March 29, 1888, the land was advertised for sale, was sold May 16, 1888, and deed executed August 28, 1889.

The court erred in not permitting the plaintiffs to amend their declaration, and also, after refusing the amendment, in not permitting them to submit to a nonsuit.

The question raised upon the statute of limitations is not without difficulty. In this state a judgment creates no lien upon the property of the judgment debtor. No lien is created until the levy has been made and notice thereof filed in the office of the register of deeds. Until 1889 no limitation was placed upon the existence of the lien by execution levy. A statute was then passed enacting that all levies theretofore made should cease to be a lien at the expiration of five years from the time the act became a law, and that all levies thereafter made should become and be void after the expiration of five years from the making thereof: 3 How. Stats., sec. 6173 a.

Actions upon judgments must be brought within ten years after the entry of the judgment: How. Stats., sec. 8736. In the present case proceedings for sale were commenced before the right to bring suit upon the judgment had expired by limitation, but the sale took place after it had expired. Executions cannot be issued and levies made after the right of action is barred: *Jerome v. Williams*, 13 Mich. 526; *Parsons v. Circuit Judge*, 37 Mich. 287. The manifest reason on which these decisions are based is that when the judgment is dead no action can be taken to revive it. But they do not hold that during the life of the judgment any action authorized by law may not be taken to enforce it, although the sale cannot take place till after the right of action upon the judgment is gone. They therefore throw no light upon the present controversy. A lien upon real estate by virtue of a levy under execution is not lost by delay in proceeding to sale where no

fraudulent purpose is shown on the part of the execution creditor: *Ward v. Citizen's Bank*, 46 Mich. 332. It follows that the lien remains in force until the statute of limitations has barred any right to proceed to foreclose it. The record of the levy is notice to every one of its existence, and is equivalent to actual possession of personal property taken under execution. Publication of the notice of sale before the right of action is barred is an open assertion of the nonpayment of the judgment. The debtor is presumed to know that the lien is being enforced. If the judgment has been paid or if he has lost any right by the failure to proceed earlier to a sale, for which the judgment creditor is responsible, the courts are open to him to restrain the sale. We think that when any proceedings authorized by law to enforce the lien are instituted before the right of action upon the judgment is barred, they are valid and the sale in pursuance thereof legal. Plaintiffs' deed, therefore, was not void because the sale took place more than ten years after the rendition of the judgment.

Judgment reversed and new trial ordered, with costs and leave to plaintiffs to amend their declaration.

The other justices concurred.

EXECUTION ISSUED ON JUDGMENT BARRED BY STATUTE OF LIMITATIONS
See Freeman on Executions, 2d ed., sec. 27 a. Section 681 of the California Code of Civil Procedure limits the time within which an execution can issue and a sale thereunder be made to five years after the entry of the judgment: *Dorland v. Hanson*, 81 Cal. 202; 15 Am. St. Rep. 44. In South Carolina the rule is that an execution cannot issue more than five years after the entry of judgment: *Garvin v. Garvin*, 34 S. C. 388. Both the levy of execution and sale thereunder must be made within the time limited for the duration of the judgment lien: *Isaac v. Swift*, 10 Cal. 71; 70 Am. Dec. 698, and note; *Lakin v. McCormick*, 81 Iowa, 545; see *Matter of Holmes*, 131 N. Y. 80. Where an execution sale is made ten years after the entry of the judgment, the purchaser takes the property subject to all liens upon the land at the levy of the execution: *Wells v. Bower*, 126 Ind. 115; 22 Am. St. Rep. 570.

PENFOLD v. WARNER.

[98 MICHIGAN, 179.]

POWER OF ATTORNEY—CONSTRUCTION.—Powers of attorney to sell and convey land are strictly construed.

POWER OF ATTORNEY—CONSTRUCTION.—A power of attorney to sell and convey any and all lands belonging to the parties in a certain county applies only to land then owned by the parties.

POWER OF ATTORNEY—LIMITATION ON.—A power of attorney given by parents to their son, authorizing him to sell and convey all land belonging to them, or either of them, in a certain county, applies only to the land then owned by them, and does not confer authority upon the son to sell land conveyed by his father to his mother after the execution of such power, although at the time of its execution she had an inchoate right of dower in the land so conveyed.

Manly C. Dodge, and Smurthwaite and Higgins, for the appellant.

D. G. F. Warner, and Pratt and Davis, for the appellees.

HOOKE, C. J. John W. Zimmerman, being the owner of a parcel of land in Frankfort, Benzie county, Michigan, joined with his wife, Barbara E. Zimmerman, in a power of attorney to their son, Morris M. Zimmerman. This was duly acknowledged and recorded. In 1888 John W. Zimmerman quitclaimed the premises to his wife, Barbara, and, shortly after, died. In 1890 Morris M. Zimmerman, as attorney for Barbara E. Zimmerman, conveyed the premises, except the north one hundred feet, to the plaintiff, for a valuable consideration, by warranty deed. In September, 1891, Barbara E. Zimmerman quitclaimed the premises, except the north fifty feet, to the defendant, Dwight G. F. Warner. Plaintiff brought ejectment. Judgment being rendered in favor of the defendants the plaintiff appealed.

This power of attorney was given by husband and wife at the time when the title to the real estate in question vested in him, and his wife had no title to any lands, aside from her inchoate right of dower in this parcel. Counsel argue from these facts that the language of the power should be construed to cover lands subsequently acquired, while on the other hand it is contended that this power of attorney conferred no greater authority than to convey her right of dower in a deed whereby her husband's title should be conveyed.

We are impressed by the importance of certainty in instruments authorizing the conveyance of lands, and by the serious consequences likely to arise if it be determined that a power

of attorney may mean one thing or another, as the tints of surrounding circumstances, resting on parol testimony, may vary. When placed upon record, as under our recording laws it may be, there should be no uncertainty in its meaning, and strangers should not be required to look beyond the language used. We are aware that there are authorities which appear to attach importance to surrounding circumstances, but, beyond such as may be deemed to create an estoppel, we cannot approve them; and, inasmuch as titles to land cannot in Michigan be maintained upon an estoppel, we cannot recognize the authority of such cases. Eliminating extrinsic circumstances from the question, its solution is comparatively easy. No doctrine is better settled than that these "powers of attorney are strictly construed, and cannot be enlarged by construction": *Wood v. Goodridge*, 6 Cush. 117; 52 Am. Dec. 771; *Morrell v. Frith*, 8 Mees. & W. 402; *Neilson v. Harford*, 8 Mees. & W. 806; *Withington v. Herring*, 5 Bing. 442; *Rossiter v. Rossiter*, 8 Wend. 494; 24 Am. Dec. 62; *Jeffrey v. Hursh*, 49 Mich. 31; 58 Mich. 246. The legislature has signified its approbation of this doctrine by restricting powers by statute: See Howell's Statutes, c. 215, secs. 5623, 5629. Recurring to the instrument in question, we find the language to be as follows:

"John W. Zimmerman and Barbara E., his wife, . . . do make, constitute, and appoint Morris M. Zimmerman our true and lawful attorney for us, and in our name, place, and stead, and, in the name, place, and stead of either of us, to bargain, sell, or mortgage any and all real estate belonging to us, or either of us, in any real estate in the county of Benzie," etc.

The plain import of this language limits the power to lands then owned by the parties: *Weare v. Williams* (Iowa, May 18, 1892), 52 N. W. Rep. 328. As the title then stood, Barbara E. Zimmerman had no title in the premises. She had an inchoate right of dower, which she might release by joining with her husband in a deed of the premises, or by her conveyance to the holder of the title: *Rhoades v. Davis*, 51 Mich. 306. It was not an interest that could be conveyed by her so long as the husband held the title to the fee. But when she received a deed from her husband, and became owner of the fee, the inchoate right of dower was extinguished by the merger, and there was nothing left for it to operate upon, so far as that parcel of land was concerned, unless we are to extend the power by construction, which, as we have seen, the courts do

not favor. This land did not belong to her when the power of attorney was executed.

Some other questions are raised upon the record, but as the case must hinge upon the power of attorney, we think it unnecessary to pass upon them.

The judgment will be affirmed.

The other justices concurred.

POWER OF ATTORNEY—WHETHER SHOULD BE LIMITED TO PROPERTY THEN OWNED BY PRINCIPAL.—So far as our investigations have extended, nothing has been found to convince us that the rule announced in the principal case should be upheld, and that a power of attorney which in general words authorizes the agent to sell, mortgage, and convey, any and all, real estate or property belonging to the principal should be limited to the property owned by him at the time of the execution of the power. On the contrary, the better rule is that a power authorizing the attorney to alienate all property owned by the principal authorizes the former to convey not only all property owned by the latter at the time of the execution of the power, but also all that he may thereafter acquire before the power is revoked. This is the rule supported by the weight of authority. Thus a power of attorney authorizing the agent therein appointed to sell any of the principal's real estate will empower him to sell real estate which the principal acquires after the execution of the power and prior to its revocation: *Fay v. Winchester*, 4 Met. 513. And a power of attorney authorizing the agent to sell, grant, and convey, any and all lands which the principal "may own," will empower the former to convey an estate acquired by the principal subsequently to the execution of the power, and will not be confined to lands owned by him at the time of its execution: *Bigelow v. Livingston*, 28 Minn. 57, 59. In this case the court said, that "the words 'all and any land which I may own,' include not only lands owned by the principal at the time when the power of attorney was executed, but also lands afterwards acquired and owned by him at any time before the power of attorney is revoked."

A power of attorney given by a wife to her husband, to "sign my name to all conveyances of real estate to which I have any right of dower, as to real estate both in the city of Chicago, Illinois, and in the town of Loup City, Sherman county, Nebraska, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever required and necessary to be done in and about the premises; it being intended to convey hereby all my right, title, and interest, in and to the above-described real estate," will not be limited so as to authorize the attorney to convey the dower interest of the principal alone, but it will be construed to empower him to convey all the right, title, and interest of the principal of whatever kind or nature in the real estate described, and to apply to lands acquired by the latter subsequent to its execution and before its revocation, as well as that owned and possessed by him or her at the time the power was made and given: *Benschoter v. Lalk*, 24 Neb. 251; *Benschoter v. Atkins*, 25 Neb. 645.

In addition to the principal case the only authority found in its support and in opposition to the ruling in the cases cited above is that of *Weers v. Williams*, 52 N. W. Rep. 328, decided by the supreme court of Iowa, May 18,

1892. In the latter case it was held that a power of attorney to "control, sell, convey, and mortgage any and all real estate I own or control," should be limited and confined to the land owned by the principal at the time of the execution of the power, and the court said that "while the question is not entirely free from doubt, yet we think the grantor intended by the language used to limit the power to mortgage to real estate she then owned. . . . The words 'I own' mean present possession or ownership as distinguished from that which is to be acquired in the future." Notwithstanding this language and the well-recognized rule that powers of attorney should receive a strict construction, there is another rule equally strong and well established to the effect that such powers, as well as all other writings, should be so construed as to effectuate the evident intent of the parties, and we apprehend that the clear intent of a principal who affixes his name to a power authorizing his agent therein named to sell, convey, and mortgage all land owned by him, is to authorize such agent to mortgage or convey not only the land then owned by such principal but also all land of which he may become the owner in the future and while the power is still unrevoked. If, in such case, the principal desires to limit the power of his attorney in fact to the conveyance or encumbrance of the property owned at the time of the execution of the power he may do so by inserting therein the words, "all or any lands which I now own," or other words of similar import. If he desires to prevent his attorney holding a power authorizing him to convey or encumber all property owned by the principal, from controlling such land as the latter may acquire after the execution of the power he has only to revoke it in order to effectuate his wish, and in the absence of the performance of either of the above acts by the principal in such a power, reason demands that the attorney should not be limited in his authority to convey or encumber the former's property whether owned by him at the time of the execution of the power or subsequently acquired.

It is well settled that when the evident purpose of a power of attorney is to enable the attorney in fact to control and convey land obtained after the execution of such power, it will be so construed, and this doctrine has been applied when the power authorizes the attorney "to sign my name to all conveyances of real estate to which I have any right of dower": *Benschoter v. Lalk*, 24 Neb. 251; *Benschoter v. Atkins*, 25 Neb. 645. When a power of attorney authorizes the agent to "grant and convey" and to "exercise general control and supervision over all such lands and real estate belonging to or that may belong" to the principal, it will empower the agent to control and convey, not only lands belonging to the principal at the time of the execution of the power, but also all lands subsequently acquired by him as well: *Berkey v. Judd*, 22 Minn. 287. And when the attorney is empowered to "bargain and sell any and all real estate that we now, or may hereafter, own," he is authorized to convey land acquired by the principal after the execution of the power of attorney: *Alexander v. Goodwin*, 20 Neb. 216. But when the authority of an attorney in fact to sell land is limited to such property as the principal owns or is interested in at the time of the execution of the power, a deed subsequently made by the attorney for land which the principal owns at the time of the execution of the deed, but in which his only interest at the time of the execution of the power was that of a mortgagee, will not convey a perfect title. The interest in land mentioned in the power of attorney must be confined to a legal interest therein, and such interest a mortgagee does not possess prior to the foreclosure of the mortgage: *Turner v. McDonald*, 76 Cal. 177; 9 Am. St. Rep. 189.

In this connection it may not be out of place to state that it has been decided that a power of attorney empowering the agent named, among other things, "to buy and sell real estate and in my name to receive and execute all necessary contracts and conveyances therefor," does not authorize such attorney to sell and convey lands to which, as the proper record shows, the principal had acquired title before the execution of the power. Such power is to be construed as having reference to a business to be inaugurated after its execution: *Greve v. Coffin*, 14 Minn. 345; 100 Am. Dec. 229; *Allis v. Goldsmith*, 22 Minn. 123.

NAYLOR v. MINOCK.

(96 MICHIGAN, 182.)

MORTGAGE BY TENANT IN ENTIRETY.—A mortgage given by a wife upon land owned by herself and her husband as tenants by entirety to secure to their son the repayment of advances made by him in the defense of his father on a criminal charge, and in maintaining him at an insane asylum, is void, and will neither bind her present interest in the land nor any interest therein acquired by her by the subsequent death of her husband.

TENANTS BY ENTIRETY—HUSBAND AND WIFE—CONVEYANCE BY WIFE ALONE.—Neither a husband nor a wife can mortgage nor convey an estate vested in them as tenants in the entirety, unless both of them join in the instrument, and every instrument by which either attempts alone to make such conveyance is void.

MARRIED WOMEN—POWER TO CONTRACT AS TO AFTER-ACQUIRED TITLE.—When the statute confers upon a married woman power only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract or in consideration of it, she has no power to contract with a third person to bind an estate subsequently acquired by her through the death of her husband.

F. A. Baker, for the appellant.

John D. Conely, for the appellee.

MONTGOMERY, J. A bill was filed in the Wayne circuit to restrain the statutory foreclosure of a mortgage. The relief prayed for was granted, and the defendant appeals.

James Minock and Bridget Minock were husband and wife. The land in question was conveyed to them on the 8th of June, 1846, by a deed in which they are named as grantees, as "James Minock and Bridget Minock, his wife." On the 15th of March, 1882, James Minock had been adjudged insane, and the defendant, his son, had become liable to pay the expenses incurred in his defense on a criminal charge, and to be incurred in maintaining him at the asylum. With the expressed purpose of securing to defendant the repayment

of these advances, Bridget Minock, on the 15th of March, 1882, executed the mortgage in question, which recites a consideration of one thousand dollars to the party of the first part, and provides:

"The party of the first part has granted, bargained, sold, remised, released, enfeoffed, and confirmed, and by these presents does grant, bargain, sell, remise, release, enfeoff, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all those certain pieces or parcels of land [a description of which follows], together with the hereditaments and appurtenances thereunto belonging or in any wise appertaining.

"To have and to hold the above-bargained premises unto the said party of the second part, and to his heirs and assigns to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever."

This grant is followed by the usual defeasance and power of sale, containing the further provision:

"And on such sale to make and execute to the purchaser or purchasers, his, her, or their heirs and assigns, forever, good, ample, and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided."

1. It will be seen that the mortgage does not purport to be given for the debt of the wife, but is given to secure obligations primarily those of her husband; nor was the mortgage given upon what was at the time of its execution her separate estate. She and her husband were tenants in the entirety, and neither could convey without the other joining in the conveyance: *Fisher v. Provin*, 25 Mich. 347; *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Manwaring v. Powell*, 40 Mich. 371; *Allen v. Allen*, 47 Mich. 74; *Vinton v. Beamer*, 55 Mich. 559; *In re Appeal of Lewis*, 85 Mich. 340; 24 Am. St. Rep. 94.

2. It is contended, however, that the mortgage debt was wholly for necessities furnished to James Minock, an insane person, for which his estate or his right of survivorship in the farm was clearly liable, and the giving of the mortgage by Bridget Minock bound her interest or right of survivorship, so that the mortgage was from the beginning a perfectly valid security. We do not think this contention can be allowed. The validity of the instrument as a conveyance of an interest in land cannot depend upon the question of whether the moral obligation of the husband to pay or secure the payment is greater or less.

3. It is next contended that, the mortgage evidencing an intent to convey the title to the property described subject to the defeasance, Mrs. Minock and her heirs are estopped from asserting an after-acquired title, and hence that, when, on her husband's death, the full title vested in her, the mortgage from that moment bound the estate. This contention is based both on the claim that such is the common-law doctrine of estopped by deed, and also that the statute (section 8506, How. Stats.) is effectual to estop Mrs. Minock and her heirs. This section, so far as is material to the question here, is as follows:

“ Unless the premises described in such deed [referring to deed on foreclosure] shall be redeemed within the time limited for such redemption, as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled as hereinafter provided.”

In *Brayton v. Merithew*, 56 Mich. 166, this statute was construed, and it was held that, as to one not under disability, the execution of a mortgage with this statute in force operated to pass, not only the estate actually owned by the mortgagor at the time, but an after-acquired title; or, in effect, that the statute is to be read into the mortgage, as a part of the contract. It is unnecessary, therefore, to determine what the rule would be in the absence of this statute. If this mortgage was, at its inception, such a contract as a married woman is entitled to enter into in this state, it must be held effectual to pass the title which vested in her at her husband's death. But herein lies the difficulty. As already stated, neither the husband nor the wife could convey the estate vested in them in the entirety, unless both joined, and any instrument by which either attempted to make such conveyance would be void. See 2 Bla. Com. 182, and cases above cited. The wife's power to make contracts is not general, but is statutory, and cannot be extended beyond the statutory limits. In the present case, as we have already pointed out, the attempt to convey the title which she held at the time in this property was ineffectual. Had she in terms contracted to bind an after-acquired estate there is no authority, either at the common law or by the statute, by which she could

have done so, for a consideration passing to another person. It has been repeatedly held that the statute of 1855 confers upon the wife power only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract, or in consideration of it. See *Johnson v. Sutherland*, 39 Mich. 579; *Kenton Ins. Co. v. McClellan*, 43 Mich. 564; *Reed v. Buys*, 44 Mich. 82. See, also, as bearing indirectly upon the subject, *Hovey v. Smith*, 22 Mich. 170; *Kitchell v. Mudgett*, 37 Mich. 81; *Carley v. Fox*, 38 Mich. 389.

It follows, from the views expressed: 1. That the mortgage was not valid, in its inception, to convey any estate; and 2. That it could not be effectual to pass an after-acquired title, because of the incapacity of the mortgagor.

The decree below was right, and will be affirmed, with costs.

The other justices concurred:

HUSBAND AND WIFE—TENANCY BY THE ENTIRETY—CONVEYANCE BY ONE SPOUSE.—A conveyance to a husband and wife vests in them an estate by the entirety, in which neither can convey any interest without the assent of the other, unless their marital relations have been severed by divorce: *Eagart v. Kepler*, 118 Ind. 34; 10 Am. St. Rep. 94, and note with the cases collected; *Bovertown Nat. Bank v. Hartman*, 147 Pa. St. 558; 30 Am. St. Rep. 759. Land held by a husband and wife as tenants by the entirety is not subject to execution in payment of his sole debts: *Town of Corinth v. Emery*, 63 Vt. 505; 25 Am. St. Rep. 780, and note; *Bruce v. Nicholson*, 109 N. C. 202; 26 Am. St. Rep. 562, and note. A mortgage and note executed by a husband and wife to secure a loan made to him cannot be enforced against her when the property embraced in the mortgage is held by them as tenants by the entireties: *Wilson v. Logue*, 131 Ind. 191; 31 Am. St. Rep. 426. See extended note to *Den v. Hardenbergh*, 18 Am. Dec. 386.

TEN HOPEN v. WALKER.

[96 MICHIGAN, 236.]

DOGS—TRESPASS BY—DAMAGES FOR KILLING—JUSTIFICATION.—The fact that a dog is committing a trespass when killed, and is, in the opinion of the person doing the killing, about to destroy some of his property, will not constitute a justification for the killing, nor in any way mitigate actual damages which the owner of the dog is entitled to recover.

DOGS—VALUABLE PROPERTY IN.—Dogs have value, and are the property of the owner as much as any other animal which one may have or keep.

DOGS—EXEMPLARY DAMAGES FOR MALICIOUS KILLING.—When a dog is killed intentionally and from willful and malicious motives its owner may recover exemplary damages, although the dog was committing a tres-

pass when killed. Such damages are not awarded as a punishment to the wrongdoer, but to compensate the injured party.

EXEMPLARY DAMAGES FOR MALICIOUS INJURY TO PERSON OR PROPERTY.

In cases of malicious injury to the person or property it is not necessary that there should be actual enmity toward the injured party to enable him to recover exemplary damages.

Dunham and Preston, for the appellant.

Francis A. Stace, for the appellee.

LONG, J. Plaintiff recovered judgment against the defendant for two hundred and twenty-five dollars as damages in an action on the case for the malicious killing of her dog.

It was shown on the trial that plaintiff's sons were walking along the highway. They were accompanied by the plaintiff's dog and two other dogs. When in front of defendant's premises the dog of plaintiff turned into the defendant's grounds, just out of the highway, and approached a pond which was kept for lilies, apparently with intent to slake his thirst. Defendant seeing it from the upper window of his house went down into the lower hall, got his gun, and, returning above, shot the dog from the upper window. It is not claimed that this dog had done any damage there at that or at any other time. On the trial the court permitted the defendant to show that upon several previous occasions other dogs had wallowed in this pond, destroying some of the plants there growing, and upon one occasion the owner of the dog, when remonstrated with by defendant, had called him vile names, and otherwise insulted and abused him. There was no fence in front of the premises, and this pond lay open to the highway.

At the close of the testimony counsel for defendant asked the court to instruct the jury:

"3. If the court shall hold that this action can be maintained upon the facts disclosed in the plaintiff's declaration, then we ask the court to charge the jury that in order to recover in this action the plaintiff must show to the satisfaction of the jury that the defendant was moved to kill the dog through malice, either towards the dog or towards the plaintiff herself; that this must be shown by declarations of the defendant made before or at the time, showing a wicked and malicious purpose, or such facts and circumstances as naturally and logically lead to the conclusion that the defendant was actuated by malice, by ill-will, hatred, or a desire for revenge.

"4. If the jury find from the evidence that the dog was committing a trespass upon the property of the defendant, and in shooting the dog the defendant was only seeking to prevent injury to his property, then there was no malice on his part, and plaintiff cannot recover.

"5. If the jury find that the plaintiff is entitled to recover, then, in estimating the damages, they can only find the fair market value of the dog.

"6. In examining and weighing the testimony of the witnesses as to the value of the dog they should scrutinize it closely, and see upon what knowledge they base their opinions. Mere opinions not based upon a knowledge of the character and qualities of the dog are not evidence of his value. Statements of witnesses of the market value of the dog in question, or of such dogs, who have never dealt in such dogs, nor ever known personally of dealings by others, ought not to be received except with great caution."

These instructions were refused, and the court directed the jury substantially that the plaintiff was entitled to recover actual damages, which would consist of the value of the dog at the time it was killed; and that even if the dog was committing a trespass at the time it was killed, and, in the opinion of the defendant, was about to destroy some of his plants, it would not be a justification for the killing, or in any way mitigate actual damages, because the law affords a remedy for the destruction of property caused by the beasts of another. The court further instructed the jury that there were but two questions for them to consider: 1. The value of the dog; and 2. Was there malice? Upon the last proposition the court directed the jury:

"If you find from the evidence that there was malice, and that these annoyances that I have mentioned did take place, you will consider those annoyances and those previous trespasses with a view of determining, in the first place, whether they fully rebut the claim of malice—whether or not they afforded an excuse or cause for killing the dog, to the extent that it would take away the malice; and if you find in the negative upon that question you are at liberty to consider them, and ought to consider them, as mitigating damages, which you would otherwise allow on account of the malice, if you find that the malice existed."

It is claimed on the part of the plaintiff that if the jury found that the killing of the dog was willful and malicious

the plaintiff, in addition to actual damages, was entitled to recover exemplary damages. Upon this portion of the case the court directed the jury substantially that while actual damages could not be mitigated by the fact that defendant had theretofore been annoyed by other dogs, yet if they found that he had been so annoyed, or that he believed at the time that the plaintiff's dog was about to destroy some of his property, they might consider whether these facts would entirely rebut malice; and if, notwithstanding those facts might be found to exist, they believed that defendant was actuated by malice they might even then award exemplary damages; for if the defendant willfully and maliciously did the killing exemplary damages would be recoverable.

We see no error in the charge. The testimony tended to show that the dog was valuable. It was a "Gordon setter," eligible to registration, and some of the witnesses placed its value as high as two hundred and fifty dollars. It had never, so far as this record shows, trespassed upon the defendant's premises, nor had he in any manner been annoyed by it. On the day it was shot it ran a few feet out of the highway to the edge of this lily pond, between which and the highway there was no fence, and, immediately as it reached the pond, defendant, without any warning to the boys who had it in charge, shot and killed it. The jury, under the charge as given, may or may not have found that the dog was killed willfully and maliciously, as the amount of the verdict is less than several of the witnesses placed its value; but there certainly was evidence which would have justified the jury in finding the act willful and malicious. The dog was not running at large, contrary to law, but was in the immediate charge of its keeper. It is settled in this state that dogs have value, and are the property of the owner, as much as any other animal which one may have or keep: *Heisrodt v. Hackett*, 84 Mich. 283; 22 Am. Rep. 529.

Usually, where an act is done with design, and from willful and malicious motives, the law compels full compensation and full compensation may not be awarded by the payment of the actual value. Damages in excess of the real injury are never appropriate where the injury has proceeded from misfortune, rather than from any blamable act; but, where the act or trespass complained of arises from willful and malicious conduct, exemplary damages are recoverable. These damages are not awarded as a punishment to the wrongdoer,

but to compensate the injured party: *Wetherbee v. Green*, 22 Mich. 811; 7 Am. Rep. 653.

All redress in damages partakes to some extent of a punitive character, and the line between "actual" and what are called "exemplary" damages cannot be drawn with much nicety. They are properly based upon all the circumstances of the aggravation attending it. The real purpose is to compensate the plaintiff for the injuries he has suffered: *Stilson v. Gibbs*, 53 Mich. 280; *Wilson v. Bowen*, 64 Mich. 133. It was said by Chief Justice Cooley, in *Stilson v. Gibbs*, 53 Mich. 280:

"In other cases there may be a partial estimate of damages by a money standard, but the invasion of the plaintiff's rights has been accompanied by circumstances of peculiar aggravation, which are calculated to vex and annoy the plaintiff, and cause him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. But in all cases it is to be distinctly borne in mind that compensation to the plaintiff is the purpose in view, and any instruction which is calculated to lead them to suppose that, besides compensating the plaintiff, they may punish the defendant, is erroneous."

In the present case the court below submitted to the jury the question whether the defendant was actuated by malice and was guilty of willful conduct in shooting the dog. The rights of the defendant were fully protected, as all the circumstances prior to the commission of the act were permitted to be put in by the defendant, showing the annoyances he had had from other dogs, and the provoking and insolent conduct of the owners of the other dogs when remonstrated with by him. The jury found that these facts did not constitute an excuse for killing the plaintiff's dog, and, we think, very properly.

In cases of malicious injury, it is not necessary that there should be actual enmity towards the person injured: *Brown v. State*, 26 Ohio St. 176. In *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496, it appeared that plaintiff's dog drove a fox upon the land of defendant's father. Defendant came up and shot the dog. On the trial he claimed that he was shooting at the fox, and accidentally shot the dog. No enmity ap-

peared to have existed between the parties. The court charged that, if the defendant intentionally and wantonly shot the dog, they might give exemplary damages. It was held that such intentional and wanton shooting implied malice, and that the instruction given was correct.

Some other errors are claimed. We have examined them, and do not deem them of sufficient importance to notice, and they are overruled.

Judgment affirmed, with costs.

The other justices concurred.

ANIMALS—VALUABLE DOG—KILLING OF, NOT JUSTIFIED, WHEN.—The law does not justify one in killing his neighbor's valuable dog because the animal has left tracks on his freshly painted porch, has been found on one occasion in his henhouse, and has come around his house at night, chased cats into the trees, and barked: *Bowers v. Horen*, 93 Mich. 420; 32 Am. St. Rep. 513, and note with the cases collected.

ANIMALS—DOGS—PROPERTY IN.—Dogs are property, and the owner may recover damages against a trespasser injuring them, though they have no market value: *Heiligmann v. Rose*, 81 Tex. 222; 26 Am. St. Rep. 804, and note; *Wheatley v. Harris*, 4 Sneed, 468; 70 Am. Dec. 258, and extended note.

EXEMPLARY DAMAGES—WHEN ALLOWABLE.—Exemplary damages are allowed in cases where a wrong is wantonly and willfully inflicted, or with such gross want of care as to justify a presumption of wantonness or willfulness, and actual malice need not be proved: *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 28 Am. St. Rep. 858, and extended note thoroughly discussing the subject: *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493; 28 Am. St. Rep. 883. See also *Pearson v. Zehr*, 138 Ill. 48; 32 Am. St. Rep. 113, where exemplary damages were allowed for the malicious killing of certain horses of the plaintiff.

FILER v. SMITH.

[93 MICHIGAN, 347.]

ARREST WITHOUT WARRANT—RIGHT OF OFFICER TO MAKE—ADULTERY.—

A prosecution for adultery can only be instituted in Michigan by the husband or wife of one of the parties to the crime and whatever suspicions an officer may have he has no right to arrest one for such crime without a warrant.

ARREST WITHOUT WARRANT—WHAT WILL JUSTIFY OFFICER IN MAKING.—

An officer is justified in arresting one formally charged with crime, though it turns out that the person charged is innocent. If he makes an arrest for felony without a warrant although he has no personal knowledge, but acts upon information received from one whom he has reason to rely upon, and although it may turn out that the person charged is not guilty or no felony in fact has been committed, yet he is justified.

ARREST—MISTAKE IN MAKING.—An officer who, through an honest mistake, and after such an investigation into the facts and circumstances as the particular case enables him to make, upon a charge of felony, arrests a party, having reasonable grounds to suppose him to be guilty and the one named in the warrant is not liable to the arrested though innocent party.

ARREST WITHOUT WARRANT—LIABILITY—JUSTIFICATION.—When an arrest is made on suspicion of felony without a warrant and it turns out that the wrong party is thus imprisoned, the party making the arrest must be prepared to show, in justification, that a felony has been committed and that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the party arrested committed it, or was implicated in it.

ARREST—MISTAKE IN MAKING—OFFICER WHEN JUSTIFIED.—An officer making an arrest upon warrant, or upon knowledge that a warrant is out, of one whose person is unknown to him, who can, under the circumstances, only act upon a photograph, or description, or both, will be excused, if he acts prudently and honestly, after making such inquiry and examination as the circumstances of the case afford. In such case, the facts being undisputed, the question of probable cause is for the court.

ARREST—MISTAKE IN MAKING—LIABILITY OF OFFICER FOR NEGLIGENCE.—An officer is bound to use all reasonable means to avoid possible mistake resulting in the arrest of an innocent person. He is not justified in relying upon a personal resemblance, as indicated by a comparison with a photograph when there is, within easy reach, means of identification, nor is he justified in relying upon circumstances deemed by him suspicious when the means are at hand of either verifying or dissipating such suspicions without risk, and if, when so negligent, he makes the arrest he is liable for false imprisonment.

ARREST—FALSE IMPRISONMENT—EVIDENCE.—When in an action to recover damages for false imprisonment, the party arrested and a photograph upon the strength of which the arrest was made, are both in court, opinion evidence as to the resemblance between the photograph and such party is not admissible.

ARREST—FALSE IMPRISONMENT—EVIDENCE.—In an action to recover for a false arrest and imprisonment, advice given by attorneys to the arresting party subsequently to the arrest is not admissible in evidence as a justification, and, even though admissible as bearing upon the question of subsequent detention, it must first appear that such advice was predicated upon a full disclosure of all the facts, an examination of all evidence of justification offered by the party arrested, and a disclosure of whatever suggestions were made by him regarding his identity, before it will be admitted.

ARREST—FALSE IMPRISONMENT—EVIDENCE.—In an action to recover for a false arrest and imprisonment, a plain unvarnished account of the arrest published in a newspaper is admissible in evidence as tending to show the publicity given to the fact of the arrest, and the consequent injury to the party arrested.

ARREST—MISTAKE IN MAKING—JUSTIFICATION OF OFFICER.—Whether an officer is justified in making an arrest without a warrant, but upon information that one is out for a party charged with crime whose photograph the officer has and between which and the party arrested he

discovers a resemblance, must depend upon whether or not the resemblance is so striking as to be convincing to a man of ordinary prudence and good judgment, and this question should be submitted to the jury for its determination.

L. K. Soper, for the appellant.

Chamberlain and Cross, for the appellee.

McGRATH, J. Plaintiff had been for some five days at Muskegon, engaged in soliciting orders for trees or shrubbery, and had taken several orders. He boarded at a private house at which several other persons were at the time boarding. Defendant, who is the sheriff of Muskegon county, on the 14th of December, 1891, received from one Cane, the sheriff of Isabella county, by letter, information that in August, 1891, one Reynolds had eloped from Mt. Pleasant with a Mrs. Nichols, the pair taking with them the five children of the latter. The letter contained a description of Reynolds and Mrs. Nichols, and a photograph of the former. On receipt of this information defendant telegraphed to Cane that he thought his man was at Muskegon. Cane replied, stating that he had a warrant for Reynolds' arrest, and requested that he be arrested and held. Plaintiff was arrested accordingly. Cane arrived the next day, and declared that plaintiff was not the man, and plaintiff was discharged, and he now brings suit for false imprisonment.

The defense was that defendant acted in good faith; that there was a striking resemblance between the photograph and the plaintiff; that on the 11th of December a woman who had been boarding at the same place had been arrested for larceny; that this woman had at first given her name as Campbell, and again as Nichols.

The court instructed the jury that: "In all cases of felony an officer has a right to arrest without a warrant, and may arrest on suspicion alone, and may justify such arrest by showing facts and circumstances upon which, in good faith, he had the suspicion of the guilt of the party arrested, and such suspicion, if well grounded, may be a complete justification of the arrest of the party charged; so that, in this case, if you find that the defendant had good reason to believe, and in good faith did believe, that the plaintiff Filer was guilty of the crime of adultery, then defendant would be warranted in making the arrest upon such charge, and holding him therefor."

This instruction could not fail to mislead the jury, under

the circumstances of this case. A prosecution for adultery can only be instituted in this state by the husband or wife of one of the parties to the crime. Whatever suspicions an officer may have, he has no right to make an arrest for adultery, of his own motion. There was no charge of adultery against Filer, and no ground for suspecting him guilty of that offense.

If a warrant was in fact issued, defendant would have had an undoubted right to arrest Reynolds: *Drennan v. People*, 10 Mich. 169. The question here is, Was defendant justified in arresting plaintiff, under the circumstances detailed by him? He claims to have relied: 1. On the resemblance indicated by the photograph; and 2. Upon the fact that the woman arrested December 11th gave her name, on one occasion, as "Nichols." Reynolds was described in the letter as fifty years of age; plaintiff was thirty-eight. This woman had two children; the fugitive had five. There was nothing suspicious about plaintiff's conduct. Defendant had seen him several times before the arrest, under circumstances which indicated that plaintiff knew that he was the sheriff. Plaintiff was present at the house when the sheriff was there with Mrs. Campbell in his custody. Plaintiff knew of her arrest, and the sheriff knew that he was aware of the fact of her arrest. Plaintiff evinced no uneasiness because of her arrest, nor had he manifested any concern regarding it, more than might have been manifested by any one of the boarders at the house. He continued to remain there for several days after her arrest. Mt. Pleasant was about one hundred miles away. It appears that at the boarding-house plaintiff was known as Mr. Filer, and the woman as Mrs. Campbell. There was no testimony that defendant had at any time before the arrest made any inquiry, at the boarding-house or elsewhere, as to the nature of plaintiff's business, his name, the length of his stay at Muskegon, what his relations were with Mrs. Campbell or Mrs. Nichols, or as to how long Mrs. Campbell had been in the city; nor was there any evidence of any improper relations between plaintiff and Mrs. Campbell, or that there had been any intimacy between the two, or that there was anything more than a boarding-house acquaintance between them. When plaintiff was arrested he protested against his arrest; insisted that his name was not Reynolds, but that it was Filer; exhibited his memorandum-book, with the name "A. C. Filer" printed in gilt letters upon the back; took from his pocket certain letters that he had received at Muskegon,

addressed to A. C. Filer, and showed the postmark thereon; exhibited a tax receipt for taxes paid at Battle Creek; and later gave the name of the cashier of one of the banks at Kalamazoo, and desired that he be telegraphed to; but, notwithstanding, he was locked up at one o'clock in the day-time, and kept in jail, in the ward with other prisoners, for thirty hours.

It is undoubtedly true that an officer is justified in making the arrest of a person formally charged with an offense, though it turns out that the person so charged is innocent; so, if he makes an arrest for a felony without a warrant, although he has no personal knowledge, but acts upon information received from one whom he has reason to rely upon, and although it may be that the person so charged is not guilty, or no felony in fact has been committed: *Samuel v. Payne*, 1 Doug. 359; *Hobbs v. Branscomb*, 3 Camp. 420; *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702; *Burns v. Erben*, 40 N. Y. 463; *Cahill v. People*, 106 Ill. 621; Crocker on Sheriffs, sec. 49; 1 Chitty's Criminal Law, 22. In *Williams v. Dawson* (Nisi Prius, 1788), referred to in *Hobbs v. Branscomb*, 3 Camp. 420; Buller, J., laid down the rule "that if a peace officer, of his own head, takes a person into custody on suspicion, he must prove that there was such a crime committed."

The rule is laid down by Mr. Bigelow, in his work on Torts, 4th ed., p. 140, that:

"The officer, in executing his process, must arrest the person named in it. If he do not, though the arrest of the wrong person was made through mere mistake, it may be a case of false imprisonment."

Citing *Coote v. Lighworth*, F. Moore, 457; *Dunston v. Paterson*, 2 Com. B., N. S., 495. A number of authorities may be cited in support of this rule: Addison on Torts, sec. 805; *Davies v. Jenkins*, 11 Mees. & W. 754; Gwynne on Sheriffs, 99; *Griswold v. Sedgwick*, 6 Cow. 460; *Lavina v. State*, 63 Ga. 513; *Hays v. Creary*, 60 Tex. 445; *Comer v. Knowles*, 17 Kan. 436. I do not think, however, that an officer who, through an honest mistake, and after such an investigation into the facts and circumstances as the particular case enables him to make, upon a charge of felony, arrests a party, having reasonable grounds to suppose him to be the guilty party, and the one named in his warrant, is liable to the arrested party, who turns out to be innocent, for whatever damages he may suffer in consequence of the arrest. Such a rule would ma-

terially interfere with the apprehension of fugitives from justice. Probable cause is a justification for criminal proceedings. Criminals who seek safety in flight are usually apprehended through officers in other localities, and by means of photographs and descriptions of the person. As is said in *Brockway v. Crawford*, 3 Jones, 483, 67 Am. Dec. 250:

"The law encourages every one, as well private citizens as officers, to keep a sharp lookout for the apprehension of felons, by holding them exempt from responsibility for an arrest or prosecution, although the party charged turns out not to be guilty, unless the arrest is made, or the prosecution is instituted, without probable cause, and from malice."

In *Eanes v. State*, 6 Humph. 53, 44 Am. Dec. 289, a murder had been committed in Franklin county by one Payne, who made his escape, and the governor issued a proclamation offering a reward for the apprehension of the criminal. One Martin was arrested in Sullivan county. The particulars of personal description annexed to the governor's proclamation applied in some respects to Martin, and in others did not. The court say:

"The liberty of the citizen is so highly regarded that the officer arresting a supposed felon without warrant must act in good faith, and upon grounds of probable suspicion that the person to be arrested is the actual felon. If he may not, under such circumstances, make an arrest, the escape of criminals would be but little obstructed by the official proclamation of the governor, and the police of the state, instead of being, as public policy urgently requires, vigilant and effective, would be altogether the contrary."

The rule was laid down in *Maliniemi v. Gronlund*, 92 Mich. 222, 31 Am. St. Rep. 576, that a private person has a right to arrest a man on suspicion of felony, without a warrant, but if he does, and it turns out that the wrong man is imprisoned, he must be prepared to show, in justification: 1. That a felony has been committed; and, 2. That the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff committed it, or was implicated in it. This rule is supported by a long line of authorities: Cooley on Torts, 2d ed., p. 202, and cases cited. But, as Mr. Cooley says:

"A peace officer may properly be treated with more indulgence, because he is specially charged with a duty in

the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief, he will be excused, even though it appear afterwards that in fact no felony had been committed:" 7 Am. & Eng. Ency. of Law, 675, and cases cited.

In *Rohan v. Sawin*, 5 Cush. 281, the court say:

"The public safety, and the due apprehension of criminals charged with heinous offenses, imperiously require that such arrests should be made without warrant by officers of the law. . . . As to constables and other peace officers, acting officially, the law clothes them with greater authority [than private persons], and they are held to be justified if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony; and this is all that is necessary for them to show in order to sustain a justification of an arrest for the purpose of detaining the party to await further proceedings, under a complaint on oath, and a warrant thereon."

Upon the same principle, and for the same reason, an officer making an arrest upon a warrant, or upon knowledge that a warrant is out, of one whose person is unknown to him, who can, under the circumstances, only act, if he act at all, upon photograph or description, or both, should be excused, if he acts honestly and prudently, making such inquiry and examination as the circumstances of each particular case afford him an opportunity to make. It is practically impossible to apprehend runaways in any other way, and the protection of society from these major crimes demands that some latitude be given to these officers of the law, who are separated from local influences and clamor, and must be presumed to act fairly and honestly.

But in all such cases, where the facts are not disputed, the question of probable cause is one of law for the court: *Hamilton v. Smith*, 39 Mich. 222, 227; *Burns v. Erben*, 40 N. Y. 463; *McCarthy v. De Armit*, 99 Pa. St. 63. To afford a justification, there must be not only a real belief, and reasonable grounds for it (1 Chitty's Criminal Law, 15), but, where there is an opportunity for inquiry and investigation, inquiry and investigation should be made. In *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702, the court, referring to an arrest made upon information received, say:

"The officer should not, however, receive every idle rumor, but should make such diligent inquiry touching the truth of

the charge as the circumstances will permit, before he assumes to arrest one upon the information of another."

Defendant was bound to use all reasonable means to avoid possible mistake, and the arrest of an innocent man: *Stanton v. Hart*, 27 Mich. 539, 541. He was not justified in relying upon a personal resemblance, as indicated by a comparison with a photograph (*Sugg v. Pool*, 2 Stew. & P. 196), especially as there was, within easy reach, means of identification. He says he did not know, and did not ask, plaintiff's name or business until after the arrest. A few moments devoted to inquiry at the boarding-house would have revealed the situation, and would have shown that there was no reason for associating him with the woman in question. An officer is not warranted in relying upon circumstances deemed by him suspicious, when the means are at hand of either verifying or dissipating those suspicions without risk, and he neglects to avail himself of those means. The case made by defendant did not justify the arrest, and the jury should have been so instructed.

The court erred in admitting the testimony of defendant as to the opinion of Hunsberger and Johnson, given after the arrest, as to the resemblance between the photograph and plaintiff. Both plaintiff and photograph were in court, and before the jury.

The testimony of the attorneys as to the advice given to the defendant was clearly inadmissible. It did not appear just what facts were stated upon which the advice was predicated. In no event could advice given after the arrest was made justify the arrest. Even though admissible as bearing upon the question of subsequent detention, it should appear that it was predicated upon a full disclosure of all the facts, an examination of all the evidences of identification offered by plaintiff, and a disclosure of whatever suggestions had been made by plaintiff regarding his identity. The opinions of these witnesses as to the resemblance between plaintiff and the photograph were likewise inadmissible.

The fact of the publication in a newspaper of the fact of plaintiff's arrest was set up in the declaration; and as tending to show the publicity given to that fact, and consequent injury, the publication should have been admitted. It was a plain, unvarnished account. Its publication was privileged. The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that

ensue in the ordinary and natural course of events, though those consequences be immediately brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts causing the damage were the necessary or legal and natural consequence of the wrongful act. The publication was such a natural, usual, and ordinary consequence of defendant's act that it must be deemed to have been contemplated.

It follows that the judgment must be reversed, and a new trial ordered.

GRANT, J., concurred with McGRATH, J.

MONTGOMERY, J. I agree with my Brother McGrath that it is generally a question of law as to what constitutes probable cause to justify an arrest without warrant. But it is apparent at a glance that the rule is not one susceptible of establishing a general test, by which the question may be determined in all cases. Generally, it is a justification if sufficient facts are known to the officer to justify a reasonable belief that a crime has been committed, and that the party arrested is the guilty party. I am not prepared to say, however, that it should be held, as a matter of law, in the present case, that the resemblance of the plaintiff to the photograph of the person alleged to have committed the offense is not, when coupled with the other facts proven, sufficient to justify the officer, but whether there was justification must depend upon the closeness of the resemblance between the photograph and the person arrested. It is manifest that this precise question is one that cannot be determined as matter of law, and should, therefore, be submitted to the jury. The language of the court in *Cochran v. Toher*, 14 Minn. 385, is peculiarly applicable to this case:

"It is manifest that no finding of specific facts could be made by the jury, not embracing a conclusion as to the reasonable effect of the same in fact, from which, under any rule of law, the court could pronounce the conclusion, as a legal inference, that they did or did not constitute reasonable cause."

In the present case it would seem that the party arrested had recently come to the county of his arrest; that he was boarding at the same house with a woman who was believed to answer somewhat to the description of the woman with whom the party accused had eloped. The officer, at the

time of the arrest, had in his possession a photograph of the accused party, and had information that a warrant was issued for his arrest, and, upon discovering a resemblance between the present plaintiff and such accused party, caused the plaintiff's arrest. In my judgment, whether the arrest was justified under these circumstances depended upon whether the resemblance was so striking as to be convincing to a man of ordinary prudence and good judgment, and this question should have gone to the jury.

I concur with my Brother McGrath on the other grounds. The judgment should be reversed and a new trial ordered.

HOOVER, C. J., and LONG, J., concurred with MONTGOMERY, J.

ARREST WITHOUT WARRANT—RIGHT OF OFFICER TO MAKE.—This question is discussed in *Commonwealth v. Wright*, 158 Mass. 149; *ante*, 475, and note, and the note to *Roberts v. State*, 55 Am. Dec. 104.

ARREST WITHOUT WARRANT FOR SUPPOSED FELONY—JUSTIFICATION.—An officer arresting without warrant upon the information of another, upon whom he has a right to rely, that the person arrested has committed a felony, is justified, though no felony has been committed: *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702, and note. An officer may arrest without a warrant one whom he has probable cause to believe guilty of a felony: *Wade v. Chaffee*, 8 R. I. 224; 5 Am. Rep. 572, and note; *Doering v. State*, 49 Ind. 563 19 Am. Rep. 669, and note. The common law permitted arrests without warrant in cases of felony or suspicion of felony: *Roberts v. State*, 14 Mo. 138; 55 Am. Dec. 97, and note. See *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266, and note, and extended note to *Eanes v. State*, 44 Am. Dec. 292, for a further discussion of this subject.

ARRESTING WRONG PERSON—JUSTIFICATION.—An officer arresting a supposed felon without warrant must act in good faith and upon grounds of probable suspicion that the person arrested is the actual felon: *Eanes v. State*, 6 Humph. 53; 44 Am. Dec. 289, and extended note; and the same rule was held true where the arrest was made by a private person in *Mel-siani v. Gronlund*, 92 Mich. 222; 31 Am. St. Rep. 576, and note.

SMEBERG v. CUNNINGHAM.

[96 MICHIGAN, 373.]

ADVERSE POSSESSION—WHAT DOES NOT CONSTITUTE.—One who is in the possession of land, but who did not enter under any claim or color of right, nor in the belief that he had any right, does not hold it by adverse possession.

ADVERSE POSSESSION.—Possession must be actual, continuous, visible, and notorious, as well as hostile, to the title of the owner in order to be adverse.

ADVERSE POSSESSION—WHAT DOES NOT CONSTITUTE.—An entry on land with intent to remain in possession until the real owner claims it or demands rent is not hostile nor adverse.

ADVERSE POSSESSION.—**STATUTE OF LIMITATIONS** BEGINS TO RUN in favor of the party in possession only from some act of possession so open, notorious, and hostile that it constitutes in law notice to the real owner.

EJECTMENT—INTEREST SUFFICIENT TO MAINTAIN.—An abutting lot-owner in a city owns the fee in the land to the center of the street, together with the right to its use, subject to the public easement, and has such an interest in the land lying between his lot and the center of the street as will entitle him to maintain ejectment against one who ousts him of such use and possession.

Ball and Hanscom, for the appellant.

Charles R. Brown and Son, for the appellee.

GRANT, J. Plaintiff is the owner of the record title to the land in controversy. Defendant claims title by adverse possession. The land is described in the declaration as:

“That portion of Palms street lying north of the center line of said street, and south of the north line of said street, and abutting on lots 15 and 16 of block 1 of White’s addition to the city of Marquette.”

From 1871 to 1880 the Champion Iron Company was owner of the governmental subdivision which included this land. The land was mainly unoccupied, but at some time a small house had been built upon it, but when or by whom does not appear. The owners of the land do not appear to have paid much attention to it for many years, though Mr. Peter White, of Marquette, had general charge of it. A fence had been built inclosing some of the land around the house. The land was platted in 1888. The house is in Palms street, and the land which defendant claims is directly in front of plaintiff’s lots, on which he erected a house. One of his lots fronts on Palms street, and the other is on the corner of Palms and Champion streets. While he was building his house and improving his lots he used the street covering the land in controversy, and

built with reference to it. During this time defendant saw what he was doing, but made no objection or claim of ownership to him until after he had lived upon his lots six months, when she built a fence along the front of his lots. Poor people appear to have moved into this house at various times, and to have occupied it without paying rent or claiming any right either to the house or to the land. One Hudson, a witness for the defendant, testified that he occupied the premises with his mother in 1873 and part of 1874; that his mother was poor, the house was empty, and he knew of no authority given them to occupy it; and that when his mother moved out the defendant moved in. Defendant occupied it until some time in 1888 or 1889, when she removed to another part of the city, but her daughter testifies that she left some goods in the house, and that she had boarders who slept there.

The character of the possession will appear from defendant's own testimony:

"Q. State how you came to go and live there.

"A. Well, a man by the name of Mr. Neff lived in the house, and my man worked there. We lived by the furnace, and he came into the house and said that it was a good place for a poor family, and that it would be near his work, and he said that he lived in there quite a good many years, and he said that he never paid any rent, nor no rent was ever asked of him he says, and he said he had poor health and could n't do any work. He worked on the docks. 'That I ain't able to do,' he says, 'I am going out west to get a bit of land.' Well, then, I saw my husband and asked him whether I would go. I says, 'I would like to look at it,' and he said it was pretty good, and 'you will never have to pay any rent.' So I went and moved in there to see how we would get along there, and I told Mrs. Swineford I would live there and make it my home, and the rest of my family, and keep it; when nobody was looking for rent I would keep it."

On cross-examination she testified that, some five or six years after she went into the house, she had a conversation with a Mr. Ely, in which he told her that it was his brother and Mr. Wells who owned the house; and that "the reason she kept it was because they were dead."

Defendant's daughter was asked what claim she heard her mother make, and she replied:

"Quite a few times, when I was going to visit her, she always said she was going to live there, because my father,

he wanted her to go out west, and she wouldn't go; it was a wild place, and she had a place of her own.

"Q. Did she give any reason for her claim?

"A. She thought nobody had ever bothered her, and never had come to look for rent and bother with her place, and she thought she might as well stay there."

On cross-examination this witness said that if her mother had had to pay rent she would not have lived there.

Meanwhile, the owners of the land paid the taxes, and the property was sold and mortgaged, and the owners of the record title exercised the usual acts of ownership over land situated as this was.

Defendant was poor, and during a large portion of the time of her occupancy of this house was the recipient of aid from the poor fund of the county. Mr. Maynard, for many years one of the superintendents of the poor, testified that in 1885 she asked him to pay the rent of the house, saying she was not able to do it. Peter White testified that in 1880, after the land was sold by the Champion Iron Company, he had the entire charge of the property, paid the taxes, exercised other acts of ownership over it, and in that year asked the defendant to pay rent, and she replied that she was too poor to pay it. These statements were denied by her, and, so far as they are concerned, it was, of course, a question for the jury.

The following special questions were submitted to the jury at the request of defendant's counsel, and respectively answered by the jury, as follows:

"Q. Did the defendant occupy the premises in dispute, either by herself or her tenants and boarders, or both, for a period of fifteen years, continuously, prior to the commencement of this suit, without recognizing any one as her landlord?

"A. Yes.

"Q. Did the defendant ever pay rent to anyone for the premises in dispute?

"A. No.

1. The court, as requested, should have instructed the jury that the defendant had failed to establish title by adverse possession. She did not enter under any claim or color of right, nor in the belief that she had any right. Her entry and possession were the same as those of former occupants, who claimed no right to the property. She did not intend to retain possession, according to her own evidence, any longer than she could do so without the payment of rent. This was

a recognition of title in some one else, and was conclusive evidence that her entry and possession were subject to that title. The answers to the special questions do not, of themselves, establish a case of adverse possession necessary to establish title. Mere possession is not sufficient. It must not only be actual, continuous, visible, and notorious, but it must be hostile to the title of the real owner. An entry with the intent to remain in possession until the real owner claims it, or demands rent, is not hostile. These questions clearly gave the jury to understand that such possession was sufficient to establish title in defendant. Their verdict can be explained upon no other theory. Her actual residence upon the property was not fifteen years. Including the time during which, according to her daughter's testimony, she had some goods in the house, her possession was barely fifteen years. The statute of limitations, in such cases, begins to run only from some act of possession so open, notorious, and hostile that it constitutes, in law, a notice to the real owner. The entry, under the circumstances of this case, was not such an act. No subsequent act or assertion upon her part, even if sufficient, is shown to have occurred fifteen years prior to the commencement of the suit.

It was said by Mr. Justice Campbell in *Campau v. Lafferty*, 43 Mich. 431, "that a holding cannot be adverse if the holder does not believe in his title." It was also said in that case that "a possession may be maintained long enough by an undisturbed and defiant trespasser to bar an ejectment." The defendant in this case did not believe in her title, nor was she a defiant trespasser.

2. It is contended that the plaintiff has no such title in this land as would sustain an action of ejectment. The plaintiff is the owner of the fee of the land to the center of the street, and has the right to its use, subject to the public easement. He may set out shade trees, construct a sidewalk, and exercise other acts of ownership and possession which do not interfere with the public use. He has a valid and subsisting interest, under Howell's Statutes, section 7790. The rights of the public are not here in issue, and the question whether the municipality could maintain an action of ejectment is not involved. Plaintiff was ousted of his possession and use by the act of the defendant. Under such circumstances, ejectment is the proper remedy.

Judgment reversed, and new trial ordered.

The other justices concurred.

ADVERSE POSSESSION—ENTRY UNDER CLAIM OF TITLE IN GOOD FAITH. An adverse occupant must enter and hold the land in good faith, believing his conveyance to be valid, in order to begin an adverse possession under a claim of title: *Wilson v. Atkinson*, 77 Col. 485; 11 Am. St. Rep. 299, and note. Adverse possession sufficient to defeat the right of action of the holder of the legal title must be hostile in its inception: *Illinois etc. R. R. Co. v. Houghton*, 126 Ill. 233; 9 Am. St. Rep. 581; *Colvin v. Republican Valley etc. Land Co.*, 23 Neb. 75; 8 Am. St. Rep. 114, and note; *Battner v. Baker*, 108 Mo. 311; 32 Am. St. Rep. 606, and note. See extended note to *Finch v. Ulman*, 24 Am. St. Rep. 388. Possession of land to be adverse must be made by means of actual entry and occupation: *Omaha etc. Trust Co. v. Parker*, 33 Neb. 775; 29 Am. St. Rep. 506.

ADVERSE POSSESSION—WHAT NECESSARY TO CONSTITUTE.—To render possession adverse, it must not only be actual, but also visible, continuous, notorious, distinct and hostile; and of such a character as to indicate unmistakably an assertion of claim of exclusive ownership in the occupant: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71, and note; *Faull v. Cooks*, 19 Or. 455; 20 Am. St. Rep. 836; notes to *Mabary v. Dollarhide*, 14 Am. St. Rep. 644, and *Illinois etc. R. R. Co. v. Houghton*, 9 Am. St. Rep. 586; *Cook v. Clinton*, 64 Mich. 309; 8 Am. St. Rep. 816, and note; *Elliot v. Lane*, 82 Ia. 484; 31 Am. St. Rep. 504, and note.

ADVERSE POSSESSION.—NATURE OF TO SET IN OPERATION STATUTE OF LIMITATIONS: See *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71, and note; *Colvin v. Republican Valley etc. Land Co.*, 23 Neb. 75; 8 Am. St. Rep. 114, and note, and especially the extended note to *De Friens v. Quint*, 28 Am. St. Rep. 158.

METCALFE v. MILLER.

[96 MICHIGAN, 459.]

PARTITION.—IN ORDER TO MAINTAIN partition there must be a concurrent holding, as the nature of the action is possessory, its object being to distribute the possession between those entitled to it. It is an adversary suit.

COTENANCY—WHAT CONSTITUTES.—If two or more persons are entitled to land in such manner that they have an undivided possession, but several freeholds, they are tenants in common. The only common characteristic of a tenancy in common is that of undivided possession.

COTENANCY.—POSSESSION OF ONE COTENANT is the possession of all, and each has the present right to enter upon the whole land, and upon every part of it, and to occupy and enjoy the whole.

REVERSIONS—NATURE OF ESTATE.—A reversioner has neither actual nor constructive possession of the land, nor the right to either, but has simply an estate in expectancy, the life estate intervening.

PARTITION AS BETWEEN COTENANTS AND REVERSIONERS.—The owners of life estates are holders in cotenancy, and as between them, partition may be had, but they are not entitled to partition as against the reversioners.

PARTITION AS BETWEEN COTENANT AND REVERSIONER.—A husband who owns an interest in the life estate of his wife in possession and an undivided interest in the reversion is not entitled to partition as against the other reversioners.

John G. Kent, for appellant.

O. A. Kent and Frank P. Guise, for the appellees.

McGRATH, J. This is a bill for partition.

Samuel Miller died in 1881, seised of certain real estate. He left a will, by which he devised to his "heirs at law, as the same would be distributed by the law of descent of the state of Michigan as said law now is." Decedent left a widow, but no issue. In the settlement of the estate, the interest of his widow, Mary A. Metcalfe, now the wife of complainant, and one of the defendants herein, was determined by the following order of the probate court:

"That the use, net income, rents, and profits of the real estate, or interest therein, of which the said testator died seised, except such as may be sold under the order of this court for the payment of any debts existing against said estate, under the provisions of the will of the testator or otherwise, and the possession of such real estate, shall be decreed to belong to and be the property of the said Mary A. Miller, for and during the period of her natural life, subject, however, to the payment of all taxes or assessments against the said property, and all necessary expenses to keep said property in repair and condition."

Complainant has since purchased one-seventy-second part of the reversion, and one-fifth of the life estate.

Mary A. Metcalfe filed an answer, admitting the matters set forth in the bill, and joining in the prayer thereof. Certain of the reversioners answered, denying complainant's right to partition. The court below dismissed the bill, and complainant appeals.

At common law, estates in remainder or reversion could not be compulsorily partitioned, nor could tenants in remainder or reversion interfere with tenants in possession. After the statutes of Henry VIII., partition was only allowed when there was an actual tendency or holding of the parties to the writ, and when any of the parties were seised or possessed of a particular estate for life or for years the partition was necessarily temporary only, and commensurate with their estate. To make the partition absolute, another writ against the remainder-man was necessary when his estate fell into possession. Our statute relating to the partition and distribution of estates in the probate court follows the rule which succeeded the adoption of these statutes. Howell's Statutes,

section 5983 (being section 21, chapter 226), expressly provides that

“When the term of a widow entitled to dower or other life-estate in the lands of a deceased person shall expire, the reversion may be assigned to the persons entitled to the same, and partition thereof be made in the manner prescribed in this chapter in relation to other estates of deceased persons.”

Howell's Statutes, sec. 7850 (being section 1, chapter 270), providing for partition in equity, is as follows:

“All persons holding lands as joint tenants or tenants in common may have partition thereof in the manner provided in this chapter.”

Section 7852 provides that

“Such suit may be maintained by any person who has an estate in possession in the lands of which partition is sought, but not by one who has only an estate therein in remainder or reversion.”

These chapters relate to the same subject—the partition of estates—and must be construed with reference to each other. Chapter 270 was designed to give to courts of equity jurisdiction in partition cases.

“The mischief,” says Mr. Freeman, “attending the ownership of estates in cotenancy, which the various statutes of partition were intended to avoid, was that which arose from disputes in regard to the occupancy of lands. . . . Through the operation of the writ of partition, it was intended that the undivided possession should be severed, and that each person having the right to be in possession of the whole property should exchange that right for one more exclusive in its nature, whereby, during the continuance of his estate, he should be entitled to the sole use and enjoyment of some specific part”: Freeman on Cotenancy and Partition, sec. 440.

It will not be contended that, prior to the division of the life estate, its owner could have demanded partition as against the reversioners. There was no concurrent holding. The action is in its nature possessory. Its object is to distribute the possession between those entitled to possession. It is an adversary suit: *Seiders v. Giles*, 141 Pa. St. 93. She had an estate in possession. If she had purchased an interest in the reversion she would still have been the sole owner of the estate in possession.

Tenants in common are persons who hold by unity of possession: 4 Kent's Commentaries, 367. Where two or more

persons are entitled to land in such a manner that they have an undivided possession, but several freeholds, they are tenants in common. The only characteristic common to tenants in common is that of undivided possession: 2 Rapalje and Lawrence's Law Dictionary, 1256. Not only is the possession of one the possession of all, but the tenants respectively have the present right to enter upon the whole land and upon every part of it, and to occupy and enjoy the whole. It is in this sense that the term "tenants in common" is used in the statute. A reversioner has neither actual nor constructive possession, or the right to either, but has simply an estate in expectancy, the life estate intervening. The owners of the life estate are holders as tenants in common, and, as between them, partition may be had; but it does not follow that either is entitled to a partition as against the reversioners.

Complainant and his wife are the owners of the particular estate. That estate must stand alone, subject to its advantages and disadvantages, and may be sold if not divisible. The object of the statute was not to subject the reversion to the burdens or infirmities of the particular estate, but to enable joint tenants or tenants in common, or persons having an undivided possession, to have partition between themselves. One of the reasons that the statute requires the petition to set forth the rights and titles of all persons interested is to enable the court to determine the very question which we have been considering.

The decree of the court below is affirmed, with costs to defendants.

The other justices concurred.

PARTITION.—WHO MAY MAINTAIN: See extended note to *Nichols v. Nichols*, 67 Am. Dec. 703. Cotenants have the right to compel partition between themselves: *Donnor v. Quartermas*, 90 Ala. 164; 24 Am. St. Rep. 778, and note. So have joint tenants and coparceners: *Ross v. Armstrong*, 25 Tex. Sapp. 354; 78 Am. Dec. 574; *Purvis v. Wilson*, 5 Jones, 22; 69 Am. Dec. 778, and note. The right to partition is given to those having the actual or constructive possession of land: *Savage v. Savage*, 19 Or. 112; 20 Am. St. Rep. 795. In Indiana one may have partition without having possession, or may have it even against an adverse claimant: *Godfrey v. Godfrey*, 17 Ind. 6; 79 Am. Dec. 448, and note.

PARTITION BETWEEN COTENANTS AND REVERSIONERS.—Partition will not be made of a reversionary interest in land covered by a license held by one of the tenants in common: *Baldwin v. Aldrich*, 34 Vt. 526; 80 Am. Dec. 695, and note. Tenants in common of a reversion cannot apply for partition without the concurrence of the owners of the present estate: *Striker v. Mott*, 2 Paige, 387; 22 Am. Dec. 646, and note. A reversioner cannot maintain per-

tion against the tenant for life in possession: *Savage v. Savage*, 19 Or. 112; 20 Am. St. Rep. 795, and note. But see especially the monographic note to *Aydlott v. Pendleton*, 32 Am. St. Rep. 778, where this question is thoroughly treated.

COTENANT.—POSSESSION OF ONE COTENANT IS THE POSSESSION OF ALL: *Coch v. Simmons*, 55 Ark. 104; 29 Am. St. Rep. 28, and note; *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and note.

REVERSIONERS—RIGHTS AND REMEDIES OF.—This question is fully discussed in the extended note to *Allen v. De Groodt*, 14 Am. St. Rep. 628.

HICKEY v. MICHIGAN CENTRAL RAILROAD CO.

[93 MICHIGAN, 492.]

NUISANCE—RIGHT TO ABATE WITHOUT NOTICE—TREES OVERHANGING BOUNDARY.—Branches of trees standing upon land adjoining a railroad company's right of way, and overhanging it to such an extent that at times they brush against the faces of the railroad company's engineers and obscure their view when their duties require them to maintain a lookout are a nuisance, which the company may abate by removing the overhanging branches without notice to the adjoining landowner. The fact that he refuses an offer of ten dollars made by the company for the removal of trees claimed by it to be a nuisance will not confer upon him the right to exact further notice before such overhanging branches are removed.

Hanchett, Stark and Hanchett, for the appellant.

Tarsney and Wicker, for the appellee.

MONTGOMERY, J. The plaintiff was the owner of land adjoining the right of way of defendant, and had planted trees upon the land within his inclosure, and very near to the fence which is claimed by him to mark the line. It is claimed by the defendant that as a matter of fact the railroad company's right of way included the lands upon which the trees were grown. It would appear, however, that the plaintiff had fenced in all the lands within his present inclosure many years ago, and it is probable that he has acquired title by adverse possession. However this may be, it appears to us that the case was tried below, on the part of counsel for both parties, with the understanding that the title to the soil upon which the trees were growing was in the plaintiff. We shall treat the case, therefore, as though the title to the land, up to the line of the fence, was in the plaintiff.

The branches of the trees in question overhung the right of way of defendant to such an extent that at times they brushed against the face of the engineer, when his duties

required him to lean out of his cab for the purpose of maintaining a lookout. On the 24th of September, 1891, the employees of defendant trimmed the branches of the trees up to the line of the fence. No claim is made that the trees were damaged beyond this, or more than was necessary to remove the overhanging branches.

The questions presented are, whether these overhanging branches constituted a nuisance; whether, as a nuisance, the defendant had a right to cause them to be removed; and whether, before removing them, it was necessary to serve notice upon the plaintiff, that he might have the opportunity to remove them; and if so, whether the notice which he had of the defendant's desire that they be removed was sufficient.

The plaintiff's testimony was as follows:

"These trees had grown so that their limbs and branches extended over the fence into the railroad company's right of way ten or fifteen feet beyond the fence. In the spring of 1891, Mr. Sullivan, the roadmaster of the Michigan Central Railroad Company, came to me, and said that the trees and their overhanging branches were a nuisance to the railroad company for the reason that the engineers could not see ahead along the right of way on the curve there at my place. We talked awhile about the matter, and he finally offered me ten dollars for permission to cut down or remove the trees. I refused this offer. He said then, 'You had better take it, or some day I will get an order to cut down those trees, and then you won't get anything.' He also said that he would see the superintendent, and find out if the company would give me any more than ten dollars for the trees. Neither Sullivan nor anyone else representing the railroad company ever saw me about the trees after that, and I never received any other offer for my trees."

The circuit judge instructed the jury as follows:

"It is the view of the court that it was the duty of the railroad company, having operated that road with these branches there for so a long time, to have notified Mr. Hickey that they were an obstruction, to a certain extent, to the line of their road; that he must remove the branches, or remove his trees, or that they did not desire them any longer to grow upon their land, which they had a right to do, without any reference to the obstruction of the view of the track; and that he must cut the branches, or remove the trees, or they would do so. Then, if he refused, they might, of their own motion, remove the

branches from the line of the right of way. I base this opinion largely upon the case, cited by counsel for the defendant, of *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 802."

We think this instruction was erroneous. It is stated, without limitation, in Wood on Nuisances, section 834:

"Any person injured by a nuisance, to the extent that he may maintain an action at law therefor, may remove so much of the nuisance as is necessary to secure to himself immunity from damage therefrom; but he must not be guilty of any excess therein, for, as to all excess of abatement, he will be a trespasser."

At section 838 it is said:

"The party judges at his peril, and if he errs in judgment he is answerable for all the damages that ensue; and if, in the exercise of the right, a breach of the peace is involved, he is answerable, by indictment, for the result."

This general rule is, however, subject to exception. It is stated in Wade on Notice, section 480 h.

"Where the act complained of is one of positive wrong or willful negligence, or the security of life or property is endangered, and the danger seems imminent, the party threatened with the injury may abate the same without giving notice to the wrongdoer, or waiting for him to remove it. Where, however, the nuisance is merely permitted to exist, and the case is not very urgent, notice, and an opportunity to remove it, is essential, before the complaining party would be justified in forcibly abating the same."

The case of *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 802, is understood to hold that nuisances created by act of omission may not be abated except after notice; but in the opinion in that case, by Justice Best, it was stated as follows:

"There is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred."

This case is referred to in *Jones v. Williams*, 11 Mees. & W. 181, in which case the court, laying down the rule that the alienee of land upon which a nuisance exists at the time of his purchase is not liable to an action without notice, said:

"We do not rely on the decision in *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 802, as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord Wynford's dictum is in favor of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the nonremoval of a nuisance erected by another."

It is worthy of note that it was conceded in the briefs of the counsel in *Jones v. Williams*, 11 Mees. & W. 181, that the notice or request is unnecessary before abating the nuisance of overhanging branches, the reason being stated that any person may lawfully stand in the highway over which the trees hang, and there cut them.

In Cooley on Torts, page 567, it is stated:

"It is a nuisance if the branches of one's trees extend over the premises of another, and the latter may abate it by sawing them off."

In Wood on Nuisances, section 112, it is said:

"Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off, or have his action for damages, and an abatement of the nuisance, against the owner or occupant of the land on which they grow, but he may not cut down the tree; neither can he cut the branches thereof, beyond the extent to which they overhang his soil." See, also, *Grandona v. Lovdal*, 70 Cal. 161.

The purpose of notice, in such case, when required, it is evident, is to give to the owner the opportunity of himself abating the nuisance. It is undisputed, from the testimony in this case, that the plaintiff knew that the railroad company claimed that these trees were a nuisance, and desired their removal. The fact that it went so far as to offer him ten dollars to do what he was legally bound to do did not, we think, confer upon him a right to exact further notice. He must be presumed to have known what his legal rights were. In the face of this, and with knowledge of the fact that the nuisance was objected to by the railroad company, he, in effect, said: "I refuse your offer of the gratuity of ten dollars." We think he is not in a position to insist that he was entitled to further notice.

The judgment will be reversed, with costs, and a new trial ordered.

HOOKEB, O. J., McGRATH, and GRANT, JJ., concurred.
LONG, J., did not sit.

NUISANCE—SUMMARY ABATEMENT BY PARTY INJURED.—A private person can abate a nuisance when it becomes an obstruction to the exercise of his private right: *Brown v. De Groff*, 50 N. J. L. 409; 7 Am. St. Rep. 794; *Lawton v. Stock*, 119 N. Y. 226; 16 Am. St. Rep. 813. A party may abate a nuisance with his own hand if he can do so without destroying property, unless such destruction is absolutely necessary: *Morrison v. Marquardt*, 24 Iowa, 35; 92 Am. Dec. 444, and note. An individual may abate a nuisance if he can do so by peaceable means: *Mohr v. Gault*, 10 Wis. 513; 78 Am. Dec. 687, and note; *Pontiac etc. Plankroad Co. v. Hilton*, 69 Mich. 115; *Johnson v. Maxwell*, 2 Wash. 432; *Stiles v. Laird*, 5 Cal. 120; 63 Am. Dec. 110, and note; *Wetmore v. Tracy*, 14 Wend. 250; 28 Am. Dec. 525, and note. For a further discussion of the right of private persons to abate a nuisance without suit see the extended notes to *Gates v. Blakes*, 26 Am. Dec. 442, and *Bowden v. Lewis*, 43 Am. Rep. 24.

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CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

GEORGE v. HEWLETT.

[70 MISSISSIPPI, 1.]

REPLEVIN—INCONSISTENT DEFENSES.—If a minor places a person in possession of property by a bill of sale, and afterwards, upon the refusal of his demand for its restitution, brings replevin for its recovery, the defendant, having interposed a general denial of the plaintiff's right to the property, is precluded from subsequently changing his position, and relying upon the fact that the action had been brought before the former repudiation of the contract of sale, or upon the failure of the plaintiff to tender certain storage charges upon the property claimed at the time when he made the demand for its restitution.

REPLEVIN—DESTRUCTION OF PROPERTY, WHEN NOT ADMISSIBLE AS A DEFENSE.—If the defendant, in an action of replevin, obtained possession of the subject matter of the litigation by executing a forthcoming bond, the subsequent destruction of the property by fire, though without any fault or negligence on his part, does not relieve him from liability.

Walker and Hall, for the appellant.

Witherspoon and Witherspoon, and *E. H. Dial*, for the appellee.

COOPER, J. This is an action of replevin, brought by the appellee against the testatrix of appellant, to recover possession of numerous articles of personal property, among which were a piano, piano stool and cover, a sewing-machine, and a diamond ring. The articles, other than those specifically named, were delivered to the plaintiff upon her entering into bond, conditioned as the law directs. The officer failed to find the diamond ring, and upon his return to that effect the plaintiff counted in trover for said ring, under Code of 1880, section 2619.

The piano, stool, and cover and the sewing-machine were redelivered to the defendant upon her entering into the statutory bond, with sureties, for the forthcoming of the same to answer to such judgment as might be rendered. The plaintiff having shown title to the property secured a verdict and judgment for the property or its alternative value as assessed by the jury.

The following facts give rise to the errors assigned:

Mrs. Hewlett is the daughter of the testatrix, and the property sued for was, during her girlhood or at her marriage, presented to her by her father or mother. Soon after her marriage, and while she resided in Birmingham, Alabama, she was adjudged insane, and committed to the lunatic asylum of that state. The piano and sewing-machine were left in storage in Birmingham during the time of Mrs. Hewlett's insanity. Upon restoration to sanity she returned to the home of her parents at Meridian, and directions were sent to the warehouseman to forward the articles to Meridian, and they were accordingly shipped, but were sent to Mrs. Ragsdale, the testatrix, instead of to Mrs. Hewlett. The reason given by the warehouseman for sending them to Mrs. Ragsdale was that he feared he would not receive his charges for storage if sent to Mrs. Hewlett. Mrs. Ragsdale paid these charges, something over six dollars, and the piano and machine were placed in Mrs. Ragsdale's house, of which Mrs. Hewlett was then an inmate.

Subsequently the mother and daughter disagreed, and the daughter left her mother's house. At or soon after this, there then being bitter feeling between them, Mrs. Ragsdale paid to Mrs. Hewlett some small sum of money, either fifteen or fifty dollars, in consideration of which Mr. Hewlett executed a bill of sale of the piano and machine to Mrs. Ragsdale. Mrs. Hewlett being at that time a minor she afterwards, but without having formally repudiated the contract of sale, demanded possession of the property, which being refused, she instituted this suit. It was further shown on the trial that pending the suit the residence of the testatrix had been destroyed by fire, and the piano, stool and cover, and the sewing-machine burned, without fault of the testatrix.

Upon these facts the appellant contends:

1. That the plaintiff could not recover the property without a formal renunciation of the contract of sale, which was not shown.

2. That she was not entitled to the possession of the property without first having paid or tendered the storage charges paid by Mrs. Ragsdale.

3. That the loss by fire, without fault of Mrs. Ragsdale, of the piano, stool, cover, and sewing-machine, discharged her of liability therefor.

We are of opinion that the defendant was precluded from making either of the defenses suggested in the first two assignments as above noted by reason of having defended the suit upon a general denial of the plaintiff's right to the property. A demand by the plaintiff for the restoration of the property implied a repudiation of her contract of sale.

Where the defendant is lawfully in possession of property a demand by the owner is necessary to perfect a right to sue; but if the defendant, being sued, stands his ground, and contests the right of property in the plaintiff, he cannot afterwards change his position and rely upon the want of demand in defense: Wells on Replevin, sec. 374.

For the same reason the fact that Mrs. Hewlett did not tender the storage charges upon the articles was rendered immaterial. Mrs. Ragsdale, so far as appears by the record, made no claim for such charges; nor did she evidence any willingness to surrender possession upon payment thereof; nor does it appear that the plaintiff knew that any charges had been paid by her. This defense is clearly an after-thought, interposed to defeat an impending verdict upon the real controversy between the parties.

The third position assumed by counsel presents a more substantial question, and one not free from difficulty in the light of former decisions of this court. We have, however, reached the conclusion that the court did not err, as to the executor of Mrs. Ragsdale, in holding the destruction of the property not to operate as a release of her liability, even though it resulted from circumstances beyond her control and without her fault.

In *Whitfield v. Whitfield*, 44 Miss. 254, it was held that the emancipation of slaves by the government precluded a plaintiff suing in detinue from recovering their value against the defendant in whose possession they were when freed. The court seems to have been controlled by the technical rules of the action of detinue, though much that is said in the opinion would be equally applicable to actions of replevin.

"We are of opinion," said Tarbell, J., who delivered the

opinion of the court, "that the solution of this case is found in the divestiture of the plaintiff's title to the slaves by the sovereign authority subsequent to the institution of the suit. Not only was the plaintiff divested of title, but the defendant was legally dispossessed of the property. This conclusion, we think, is founded in reason and justice, and may be sustained upon general principles, independently of adjudicated cases. Indeed, it is one of the peculiar features of the action of detinue that when judgment is for the specific property, or its alternative value, payment of the value vests title in the defendant, which is defeated where title has passed to third parties, or, as in the case at bar, where title in either party is rendered impossible or illegal by operation of law."

It is apparently conceded throughout the opinion that if the loss or destruction of the property is caused by the fault of the defendant, the plaintiff may recover its full value, though it is manifest that, under such circumstances, there would be no title in the plaintiff at the time of trial, nor would payment of the judgment vest title to the property in the defendant. The whole argument of the court in this case, as also that of the supreme court of North Carolina in *Bethea v. McLennon*, 1 Ired. 523, which was so much relied on by Judge Tarbell, proceeds, upon what seems to us the radical error of excusing the original wrong of the defendant in taking or withholding the property of the plaintiff by reason of the circumstances of the event by which the property is destroyed. The defendant is thus permitted to unlawfully keep the plaintiff out of possession of his own, and yet to cast upon him the risk of its destruction by natural causes or inevitable accident. It is to be noted also that the rule established applies only because of the technicalities of the action, and may be evaded by the plaintiff's dismissing the action of detinue and counting in trover for the conversion of the property. If he pursues this course the rule of damages, supposed to be founded in reason and justice, is dissolved, and the loss flowing from the destruction of the property is reimposed upon the defendant.

In *Whitfield v. Whitfield*, 44 Miss. 254, the controlling factor in the decision seems to have been that in detinue the plaintiff seeks to recover the specific thing, and damages for its detention, and but little force is given to the right also asserted in the suit to have the alternate value if the thing itself cannot be recovered. We are unable to yield our con-

victions to the unsatisfactory and exceedingly technical reasoning of the court in that case. The decided weight of authority is against it, and "reason and justice" oppose it: Wells on Replevin, secs. 455, 601, and authorities there cited.

The cases of *Young v. Pickens*, 45 Miss. 553, *Irion v. Hume*, 50 Miss. 419, and *Atkinson v. Forworth*, 53 Miss. 741, stand upon totally different principles. They were cases of attachment or execution levied upon property in which bonds have been executed for the forthcoming of the property, and the property lost or destroyed without fault of the obligors. There was no precedent wrong or trespass by which the property was taken from the owner, and the liability of the obligors rested wholly upon contract, the performance of which having been rendered impossible, without fault on the part of the obligors, they were held to be discharged. It is quite a different thing to say, as was decided in *Whitfield v. Whitfield*, 44 Miss. 254, that inability to produce the property, the subject matter of the litigation, excuses from liability for the precedent wrong of taking or holding it against the true owner. That case is overruled to the extent that it announces the rule of nonliability of the defendant to respond in damages for the value of the property lost.

Judgment affirmed.

In *McPherson v. Acme Lumber Co.*, 70 Miss. 649, the court adhered to the doctrine of the principal case, that the burning of the subject matter of a replevin suit after it had been redelivered to the defendant and a forthcoming bond given will not release the defendant from liability.

REPLEVIN—DEFENSES—DESTRUCTION OF PROPERTY SUED FOR.—An execution issued to enforce a judgment for the return of property in replevin, or its value, may not be resisted upon the ground that the property has been destroyed by an act of God: *De Thomas v. Witherby*, 61 Cal. 92; 44 Am. Rep. 542. In an action of detinue, in which the answer is *non detinet*, the plaintiff may recover the value of an animal sued for, though it dies during the pending of the suit without the fault of the defendant, unless the matter is brought to the attention of the court by a plea *puis darrien continuance*: *Arthur v. Ingels*, 34 W. Va. 639.

FOOTE v. HAMBRICK.

[70 MISSISSIPPI, 157.]

HUSBAND AND WIFE—AGENCY OF HUSBAND FOR WIFE.—Where the bill to foreclose a trust-deed on a homestead, the effect of which the wife seeks to avoid on the ground of a material alteration made therein by her husband after its execution, avers that the whole transaction was between the complainant and the husband of the defendant, "except that the defendant executed the papers after they were prepared," etc., this exception is entirely inconsistent with any inference that the husband was the agent of his wife in regard to the final act of making the conveyance contemplated in the preliminary negotiations.

ACQUIESCENCE, KNOWLEDGE IS ESSENTIAL TO.—If a wife seeks to avoid a deed of trust on her homestead on the ground that it had been corrected by her husband after its execution, and the bill asking for foreclosure of the deed avers that she "was either informed of the correction and acquiesced therein, or never had any information that any mistake had been made," etc., the alternative statement negatives the idea of acquiescence on the wife's part; nor is such acquiescence shown by a letter written subsequently to the alteration, in which she admitted that the deed of trust embraced her homestead, and that the complainant could lawfully proceed to have it sold, such an admission being entirely consistent with the assumption that she knew nothing about the alteration.

AN ALTERATION WILL NOT AVOID AN INSTRUMENT, though material and made without the knowledge or consent of one of the parties, if it is merely the correction of a mistake, to conform the writing to the intention of all the parties, and is made in a manner clearly negating the idea of any fraud or of a design to obtain an advantage thereby.

ALTERATION OF CONVEYANCE OF HOMESTEAD—CORRECTION OF MISTAKE, HOW FAR AVOIDS.—Where a husband and wife execute a mortgage, which, owing to a mistake in the drafting, does not, as was intended, cover their homestead, and the husband afterwards, without the knowledge or consent of his wife, but with no fraudulent design, alters the description, merely for the purpose of conforming it to the intention of the parties, the altered instrument will stand good as to all the lands included in the corrected description except the homestead. As to that, the deed, under such circumstances, is not the act of the wife.

Rives and Rives, and H. W. Foote, for the appellant.

A. C. Fant and A. C. Bogle, for the appellee.

WOODS, J. The material facts shown by the appellant's original bill, and admitted by the demurrer of the appellee, are these, viz: The appellee and her husband, J. T. L. Hambrick, being indebted to appellant in the sum of six thousand, nine hundred and seventy-three dollars and ninety-five cents, agreed to give him their note for that amount, and to secure the payment thereof by a trust-deed in his favor on certain lands in Noxubee county, including the northeast one-fourth and thirty acres off the east side of the northwest one-fourth of

section 17, township 16, range 19; and they accordingly made and delivered to appellant their promissory note for said sum, due December 1, 1891, executing, at the same time, to Thomas Foote, as trustee, their deed of trust, to secure the payment of the said note, intending to include in the trust-deed the land, and only the land, fully and particularly set out and described in the bill, in which is included the said northeast one-fourth and the thirty acres in the northwest one-fourth of said section 17; but that, by mistake in drafting the trust-deed, the southeast one-fourth, and thirty acres off the east side of the southwest one-fourth, of said section 17 were inserted, instead of the northeast one-fourth, and thirty acres off the east side of the northwest one-fourth of said section as was intended. Neither the appellee nor her husband owned any land in the southeast one-fourth or the southwest one-fourth of said section 17; but appellee did, at that time, own the northeast one-fourth, and thirty acres off the east side of the northwest one-fourth, of said section, and these lands in the northeast one-fourth and the northwest one-fourth were intended by all the parties at the time to be included in said trust-deed, together with the other lands described in the bill, and correctly embraced and set out in the deed, and appellee understood that all of the lands described in the bill of complaint were included in the trust-deed. Some time after the execution of the trust-deed, complainant and the husband of appellee, one of the makers of the note and trust-deed, had a conference touching the matter, and he agreed to the correction of the trust-deed, and the said husband of appellee took the deed, and, in the presence of complainant, erased the letter "S," in "S. E. one-fourth" of section 17, and wrote the letter "N" in place of the erased letter "S," and did the same with the letter "S" in the "S. W. one-fourth" of section 17, so that said deed then, as it was first intended it should, embraced all the lands described in the bill filed herein, and said trust-deed was itself filed as an exhibit to the bill. The said northeast one-fourth, and the thirty acres off the east side of the northwest one-fourth, of section 17 embraced the homestead of said appellee and her said husband, and the appellee was either informed by her husband of the mistake which had been made, and of its correction by him, as set out and shown in the bill, and acquiesced therein, or she never had any information that any mistake had been made, but supposed all the time that the trust-deed

included and described the said northeast one-fourth, and the thirty acres in the northwest one-fourth, of said section 17, the land which she really owned, and which embraced her homestead; and appellee, as late as December 3, 1891, in a letter written to appellant, admitted that the deed embraced her homestead, and that appellant could lawfully proceed to have the same sold. The whole of said promissory note, principal and interest, remains due and unpaid, and appellee refuses to pay the same, or any part thereof, and Thomas Foote, the trustee, and J. T. L. Hambrick, appellee's husband, are now dead.

The prayer of the bill is for a decree of the court for a sale of all, or of a sufficiency, of the lands embraced in the trust-deed, as corrected, for the satisfaction of the appellant's debt.

To this bill appellee interposed her demurrer, assigning, among other causes, as the second ground, that the alteration of the trust-deed, as averred and set out in the bill, rendered the same void, and destroyed all rights which appellant had thereunder. The demurrer was by the court below sustained, and the bill dismissed, the appellant declining to amend; and from this action an appeal is taken.

Before proceeding to consider the proposition thus presented, it is necessary for us to dispose of two contentions, relied upon by counsel for appellant as conclusive of the controversy, and as obviating any requirement on our part to determine the legal question raised by the second ground of demurrer.

1. It is said for appellant that it sufficiently appears from the statements of the bill that J. T. L. Hambrick, the husband of appellee, was the agent of his wife in this entire transaction, and was authorized to make such alteration and correction of the trust-deed. This contention rests upon an erroneous view of the meaning and effect of the averment of the bill, "that the whole transaction was between complainant [appellant] and said J. T. L. Hambrick, acting for himself and his wife, except that defendant [appellee] executed the papers after they were prepared," etc. The exception utterly negatives all thought that Hambrick had any sort of agency from the wife when the final step in the negotiations had been reached, and the consummation of the agreement arrived at by the negotiations was to be executed. When the final and all-important act of making the conveyance contemplated by appellant and J. T. L. Hambrick in their prelimi-

nary negotiations was to be performed, the appellee appeared in person and executed the deed. In this act there was no agency, for she represented herself and acted for herself. That there was ever any subsequent authorization of the husband, in any respect, is not averred in the bill.

2. It is insisted further, however, by counsel for appellant, that the bill shows acquiescence—that is, assent—subsequent, on appellee's part, to the alteration and correction of the deed made by her husband. This contention rests upon the averment of the bill, "that said defendant [appellee] was either informed by her husband of the mistake that had been made, and that had been corrected by him as aforesaid, and acquiesced in said correction, or she never had any information that any mistake had been made, but supposed all the time that the said deed of trust embraced and included said northeast one-fourth and thirty acres off the east side of the northwest one-fourth of said section 17," etc.; and upon another averment of the bill, to wit, "that as late as December 3, 1891, said defendant, in a letter to complainant, admitted that said deed of trust embraced her homestead, and that complainant could lawfully proceed to have it sold."

If the first averment, to the effect that appellee was informed by her husband of the correction and alteration of the deed, and acquiesced therein, had gone no further, and had not been burdened with its alternative statement—which appellee is entitled to take as true against him—to the effect that appellee never knew of the alteration and correction made by her husband, there would be ground for the contention. But the alternative averment that appellee never knew of the alteration, but always supposed the northeast one-fourth and the thirty acres in the northwest one-fourth were embraced in the deed, is so palpably in conflict with the idea of consent to alteration on her part as to leave no place for controversy. It is vain to try to imagine consent to that of which the supposed consenting party has no knowledge. Nor is this contention given any support by the other averment of the bill, on which reliance is placed by appellant's counsel, to the effect that in her letter of December 3, 1891, appellee admitted that the deed embraced her homestead, and that appellant could lawfully proceed to have it sold. This averment is altogether consistent with the alternative statement contained in the former averment which we have examined. If appellee supposed, all the time, that her homestead was em-

braced in the deed as originally drawn, the letter is but the reasonable expression of her understanding of the extent of the encumbrance upon her estate, and of the rights of appellant under such encumbrance. But, that acquiescence—consent of appellee to the correction and alteration—is predicable of anything, or everything, said to have been admitted in her letter, is not maintainable.

We now come to the examination and determination of the chief question made by the record before us, in which is, fairly stated, Does the alteration of the trust deed, in a material matter, by one of the grantors, after its execution and delivery, and while in the custody of the beneficiary, and with his privity, without the knowledge and consent of the other grantor, whereby an advantage is conferred upon the beneficiary, render the deed absolutely void, though the alteration was made in good faith, in an honest effort to correct a mistake, and to conform the instrument to the real intention of all the parties at the time of its execution?

The courts in England and the United States which have answered this question affirmatively, holding that any alteration of a deed, bond, bill, or note, when made by the voluntary act of the creditor, to his advantage, and whereby the responsibility of the debtor bound is enlarged or injuriously affected, no matter what the motive with which the alteration is made, destroys the instrument altered, declare that the principle or rule is founded: 1. In public policy, to protect debtors who have, in writing, bound themselves in a particular manner, and for a certain object, from acts hurtful to them and hard to be guarded against, and done in their absence, and without their consent, it being thought that to permit such alterations would destroy the value of written contracts by opening the door to endless frauds and perjuries; and 2. For the reason that no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected.

It is impossible to yield the assent of the mind to the first ground on which the rule is supposed to be founded, for to do so would be, in effect, to say that no written instrument shall ever be made to correspond to and effectuate the real contract between the parties by extrinsic evidence; that the naked letter of the written contract, though mistakenly drawn, shall not be shown by any parol proof, not to embody the true agreement between the parties. To refuse to listen to parol

evidence, to ascertain whether the written instrument embodied the agreement of the parties, or through mistake, willfully or inadvertently made, failed to do so, would indeed shut the door against the possibility of fraud and perjury by one of the parties, but it would at the same time open it wide to fraud and knavery on the other side. The proper protection of debtors who have bound themselves in writing will be best secured, not by absolving them from obligations which they have assumed, or continuing them in properties which they have agreed to part with for valuable considerations, but by ascertaining what is the truth, and compelling observance of that by all parties.

The second reason advanced in support of the rule appears to us equally unsound, for it assumes that any alteration of an instrument, under any circumstances, is fraudulent. But to talk of "permitting a man to take the chance of committing a fraud, without running any risk of losing by the event when it is detected," in a clear case of an alteration, even in a material part of the instrument, made in good faith to carry out the admitted intention of the parties, though done under mistake as to the propriety or efficacy of such an act, is a perversion of terms, and an abandonment of the proposition under consideration. Of course, if to secure an advantage, a fraud is committed whereby the responsibility of the person sought to be charged is increased, the instrument will be avoided, for fraud vitiates everything tainted by it. Even this wholesome rule sometimes operates hardly; but to extend the doctrine, and deny access to the courts to those who have innocently and honestly sought, erroneously, to correct a confessed mistake in the written instrument, would be harsh and inequitable indeed. The public welfare requires the infliction of punishments for crimes; and for offenses against individual rights conceived in knavery and brought forth in fraud, the transgressor is made to realize the hardness of his way by a refusal of the law to yield him any aid in attempting to take anything under his fraud-infected instrument; but we cannot bring ourselves to consent that an honest mistake made by a party to a contract to conform the instrument to the real agreement, in order to carry out the true intention of all the parties, should utterly destroy the validity of the writing, and so visit upon the innocent, though mistaken, party to the attempt at conformation, the confiscation of all the property or estate involved, and that, not for

the benefit of the state, but for the other party to the contract—a person whose real agreement and intention originally was to be bound exactly as the offending party innocently, but mistakenly, sought to show he was bound by making the writing speak the real truth.

When we come, too, to carefully examine the authorities holding to this harsh and unjust rule, we shall find in their inharmonious and inconsistent utterances that, while professing adherence to the principle, the application of it is constantly avoided by endless exceptions and limitations. The sturdy adherence of courts in England and America to the rule in theory is in bewildering contrast with the practical nullification of it in concrete application to innocent but mistaken offenders, by the same courts.

This rule, as announced in *Pigot's case*, 11 Coke, 26 b, is as follows: "When any deed is altered, in a point material, by the plaintiff himself or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line or through the middle of any material word, that the deed thereby becomes void." And while the long subsequent English cases, as well as the American cases which follow and are founded upon the authority of this ruling by Coke, all point to *Pigot's case*, 11 Coke, 26 b, as the source of their inspiration that half of the ruling relating to alterations made by strangers is not now given credit by any court in the United States, and as to the other half of the rule relating to alterations by the obligee, the courts of both countries are industrious to and successful in finding some exception or modification or limitation by which to save the unwary who have mistakenly, but not fraudulently, undertaken to correct admitted mistakes in the contract as originally drawn.

In *Kershaw v. Cox*, 8 Esp. 246, suit was brought on a bill of exchange, drawn by Collier and Son in favor of Cox, the defendant in the suit, and indorsed by Cox and delivered to Kershaw, son of one of the plaintiffs, and he, being indebted to plaintiffs, remitted the bill to them in payment of his debt. The day following, the bill was sent back by plaintiffs on discovering that the words "or order" were wanting, so that it could not be negotiated by indorsement. On receiving it back, Kershaw, the son, applied to the defendant and indorser, who referred him to Collier, the drawer, who inserted the words "or order," giving negotiability to the bill. On

trial it was contended for defendant that, without defendant's consent, there had been a material alteration by the insertion of the words "or order"; but the contention was disallowed, Mr. Justice Le Blanc intimating an implied assent to the alteration by defendant, and expressly saying that the alteration was not in a material part. And yet, in the later case of *Knill v. Williams*, 10 East, 431, which was a suit on a promissory note, originally expressed to be "for value received," but altered the next day, not in pursuance of the original intention of the parties, by consent, by adding the words "for the goodwill of the lease and trade of Mr. F. Knill, deceased," Mr. Justice Le Blanc, strangely enough, says, in response to suggestion of counsel, that this case fell within the rule as applied in *Kershaw v. Cox*, 3 Esp. 246, "The opinion which I delivered in *Kershaw v. Cox* can only be supported on the ground that the alteration then made in the bill the day after it was negotiated was merely the correction of a mistake made by the drawer of it in having omitted the words 'or order,' which it was intended at the time should be inserted; for the alteration there made was a very material one." When *Kershaw v. Cox*, 3 Esp. 246, was on trial the alteration was immaterial and did not avoid the bill. In the subsequent case of *Knill v. Williams*, 10 East, 431, after *Kershaw* had been safely delivered from the pit digged by the lord chief justice in *Pigot's case*, 11 Coke, 26 b, the alteration appeared to the same judge very material. The court held to the rule in the abstract, but refused its application in the concrete.

In *Brutt v. Picard*, 1 Ryan & M. 87, which was a suit by the indorsee against the acceptor of a bill of exchange, Abbott, Lord C. J., said: "I shall leave it to the jury to decide whether this bill was not dated by mistake 1822. If they are of opinion that it was originally the intention of the parties to the bill that it should have been dated 1823, and that the figure 2 was inserted by mistake, I am of opinion that this alteration will not vacate the bill." In this case, though the alteration was in a material point, the date of the bill, yet the striking out of 2 and the inserting of 3, to make it conform to the original intention of the parties, was held not to render void the bill. The correction of a mistake by a third person, to whom the bill was simply intrusted for delivery to the indorsee, was held not to vitiate, whereby *Brutt* was saved the wretched consequences that would have followed the ad-

herence of the court in the concrete to the rule in *Pigot's case*, 11 Coke, 26 b. In view of these applications of the rule in England we may well join Lord Abinger in saying, in his opinion in *Hutchins v. Scott*, 2 Mees. & W. 809: "The old law was, no doubt, much more strict than it has been in modern times."

In many of the American cases professing to stand by that part of the inequitable old rule which renders void an instrument altered, without regard to the motives of the person making the alteration, we find like evidence of the practical abandonment of the doctrine, in cases of mere mistake—where fraud cannot be affirmed. In support of this remark, and to avoid the undue extension of this opinion by protracted examination in detail, we quote from Parsons on Notes and Bills, volume 2, 568, 569: "Words which the law would annul or supply may be added to a note or bill, and constitute no material alteration; for it would be unworthy of the wisdom of the law to decide that an incautious interlineation of a word, which the same law would necessarily imply, should defeat the contract. . . . Mistakes in a note or bill may be corrected, and the alteration will not vitiate; the principle and reason being quite analogous to those stated in the preceding paragraph. The insertion of words or figures which have been left out by mistake is no defense."

It must be conceded, however, nearly all text-writers, and the majority of the courts of last resort in the United States, yet assert the correctness, in a general way, of the harsh rule we have been considering. But we find excellent authority for the juster and more equitable rule, which we have foreshadowed—that an alteration innocently made, without improper motive, to conform the instrument to the intention of the parties at the time of its execution will not avoid it. In *Bowers v. Jewell*, 2 N. H. 543, the court says: "Although, then, it may not be too vigorous to hold that any alteration affecting the evidence to be offered on trial is material, yet it is reasonable and just to permit a party to show that the alteration was by consent of those interested, was by accident, or under circumstances rebutting every presumption of improper motives. . . . So, the intent must be fraudulent; or in other words, the act done with an eye to gaining an advantage." And in the very recent case of *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, it is said by the court: "The defense at the trial was an alleged unauthorized alteration of

the note by inserting in it the words 'or bearer.' The judge at the trial ruled that if the alteration, though unauthorized, was innocently made, without any fraudulent or improper motive, it would not avoid the note. That was correct, and is well borne out by the principle established in *Milbery v. Storer*, 75 Me. 69, 46 Am. Rep. 361. . . . The alteration in the present instance was a material one. It undertook to foist a contract on the maker not made by him. It changed the obligation as an instrument of evidence." And to the like effect are other causes determined in the supreme court of Maine, beginning as early as 1839, in *Hervey v. Harvey*, 15 Me. 357.

In *Russell v. Reed*, 36 Minn. 876, we find this satisfactory statement of the rule of law: "But the unauthorized and material alteration of a mortgage by the mortgagee, or with his privity, after execution, unexplained, is presumptively fraudulent, and vitiates the contract."

The like enlightened ruling was made by the supreme court of Massachusetts, in the case of *Adams v. Frye*, 3 Met. 103. Said Dewey, J., in delivering the opinion of the court: "The court are of opinion that the rule of law applicable to the case before us may be properly stated as follows: 1. That if the obligee of an unattested bond, after the execution and delivery thereof, shall, without the knowledge and assent of the obligor, fraudulently, and with a view to gain some improper advantage thereby, procure a person who was not present at the execution of the bond, to sign his name as an attesting witness, such act will avoid the bond and discharge the obligor from all liability on the same; and 2. That the act of the obligee in procuring the signature of one as a witness who was not present at its execution, and not duly authorized to attest it, will, if unexplained, be *prima facie* sufficient to authorize the jury to infer the fraudulent intent; but that it is competent for such obligee to rebut such inference, and, if the act be shown to have been done without any fraudulent purpose, the bond will not be avoided by such alteration."

In harmony with this general view is the opinion of the court in *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298.

Without pursuing the examination further, it remains to be said that the modern and liberal rule has been adopted in this state, in the case of *McRaven v. Crisler*, 53 Miss. 542, in language so forcible and unambiguous as to forever put an

end to controversy in our midst. It was well said by Chalmers, J., in that case: "But, even if it be deemed a material alteration, we think it is equally clear that it did not vitiate the note. It was but the correction of a mistake, so as to conform the note to the intention of both the parties to it, and it was made in such manner as clearly to negative any fraud upon the part of the payee, or any intention to obtain an advantage. That under these circumstances alterations in notes will not vitiate them, we think is well settled."

An exhaustive examination of this question, with careful and protracted consideration of the subject as again presented in the case at bar, confirms us in the wisdom and justice of the former opinion of this court in the case just cited, and we decline to depart from it.

In response to the suggestion of counsel, we have only to add that the rule is applicable to alterations in deeds, bonds, notes, and bills alike. There is no contrariety of opinion on this point in all the numerous authorities examined by us. Indeed, it is held that there is greater reason for the rule in cases of notes than in those of deeds, because of their negotiability and the consequent increase of danger from alterations.

The act of alteration in the case before us, it is hardly necessary to say, is nugatory and inoperative, whereby the lands constituting the homestead were inserted. As to these, the deed is not the act of appellee. But for that unauthorized act, the deed, as to all the other lands, is held by us not to be avoided, and that the demurrer should have been overruled.

Decree reversed, demurrer overruled and leave to answer given within thirty days after mandate filed.

ESTOPPEL BY ACQUIESCENCE—KNOWLEDGE.—In order to raise an estoppel by acquiescence it is necessary that the party to be estopped should be aware of his own rights and should perceive that the other party is acting upon a mistaken notion of his rights: *Sumner v. Seaton*, 47 N. J. Eq. 103. A corporation is not estopped by reason of its failure to disaffirm an unauthorized contract until it has knowledge that the contract has been made, or that the party claiming the estoppel has been injured by its unauthorized act: *Lyndon Mill Co. v. Lyndon Literary etc. Institution*, 63 Vt. 581; 25 Am. St. Rep. 783, and note. Acquiescence in the payment of funds by an administrator to certain persons under a mistake as to the legal rights of such persons does not estop the true heir from asserting her claim to such funds on being apprised of her rights: *Davis v. Bagley*, 40 Ga. 181; 2 Am. Rep. 570. Mutual recognition of a wrong line by adjoining proprietors, and their ac-

quiescence therein, are not conclusive as to their respective rights until there has been possession for the statutory time: *Crowell v. Beber*, 10 Vt. 23; 23 Am. Dec. 172. See, also, *Hardy v. Chesapeake Bank*, 51 Md. 562; 34 Am. Rep. 325.

ALTERATION WILL NOT AVOID INSTRUMENT, WHEN.—The alteration of a promissory note by a stranger interlining the words “or bearer” after the payee’s name will not affect the instrument: *Andrews v. Calloway*, 50 Ark. 258; *Gleason v. Hamilton*, 138 N. Y. 353. An alteration making a bill or note conform to the agreement between the parties does not vitiate it. *Williamson v. Smith*, 1 Cold. 1; 78 Am. Dec. 478, and note. A material alteration of an instrument by an agent of one of the parties without express or implied authority to do so does not affect the instrument: *Hunt v. Gray*, 35 N. J. Eq. 227; 10 Am. Rep. 232, and note; *White etc. Machine Co. v. Dakin*, 86 Mich. 581. See *Miller v. Stark*, 148 Pa. St. 164, and also the extended note to *Woodworth v. Bank*, 10 Am. Dec. 267.

TRIBETTE v. ILLINOIS CENTRAL RAILROAD COMPANY.

[70 MISSISSIPPI, 182.]

EQUITY WILL NOT INTERFERE TO PREVENT A MULTIPLICITY OF SUITS, unless the questions involved are of equitable cognizance. The mere fact that there is a community of interest in the questions of law and fact presented by a given controversy, or in the kind and form of relief demanded by or against each of several individuals will not warrant such interposition.

EQUITY—LIMITS OF JURISDICTION TO PREVENT A MULTIPLICITY OF SUITS.—

A defendant sued for damages by several different plaintiffs, who have no community or tie connecting them, except that each has suffered by the same act of negligence, cannot enjoin them from prosecuting their actions separately at law, and compel them to obtain relief by a single suit in chancery.

Calhoon and Green, Williamson and Potter, and Brame and Alexander, for the appellant.

Mayes and Harris, M. Green, and C. M. Williamson, for the appellee.

CAMPBELL, C. J. A number of different owners of property in the town of Terry, destroyed by fire from sparks emitted by an engine of the appellee, severally sued in the circuit court to recover of the appellee damages for their respective losses by said fire, alleged to have resulted from the negligence of the defendant. While these actions were pending, the appellee exhibited its bill against the several plaintiffs, averring that no liability, as to it, arose by reason of the fire, which arose, not from any negligence or wrong of it or its servants, but from the fault of others, for which it is not re-

sponsible; and that the plaintiffs in the different actions are wrongfully seeking to recover damages by their several actions, all of which grew out of the same occurrence, and depend for their solution upon the same questions of fact and of law. Wherefore, to avoid multiplicity of suits, and the consequent harassment and vexation, all of the said several plaintiffs are sought to be enjoined from prosecuting their different actions, and to be brought in, and have the controversies settled in this one suit in equity. There is no common interest between these different plaintiffs, except in the questions of fact and law involved.

The injunction sought was granted, and the defendants served with process, when they appeared, and demurred to the bill, and moved to dissolve the injunction on the face of the bill. The case was heard on motion to dissolve the injunction, and it was overruled, and an appeal granted.

The question presented is as to the rightfulness of the suit against the defendants, on the sole ground that their several actions at law involve the very same matters of fact and law, without any other community of interest between them. The granting and maintaining the injunction are fully sustained by Pomeroy's Equity Jurisprudence, volume 1, section 255 et seq., and it is probable that any judge authorized would have granted the injunction upon the text cited. But we affirm, after careful examination and full consideration, that Pomeroy is not sustained in his "conclusions," stated in section 269 of his most valuable treatise, and that the cases he cited do not maintain the proposition that mere community of interest "in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body," is ground for the interposition of chancery to settle, in one suit, the several controversies. There is no such doctrine in the books, and the zeal of the learned and usually accurate writer mentioned, to maintain a theory, has betrayed him into error on this subject. It has so blinded him as to cause the confounding of distinct things in his view of this subject, to wit: joinder of parties, and avoidance of multiplicity of suits.

It has been found that many of the cases he pressed into service to support his assertion are on the subject of joinder, where confessedly there could be no doubt that the matter was of equity cognizance. Every case he cited to support his

text will be found to be either where each party might have resorted to chancery or been proceeded against in that forum, or to rest on some recognized ground of equitable interference other than to avoid multiplicity of suits. The cases establish this proposition, viz: Where each of several may proceed or be proceeded against in equity, their joinder as plaintiffs or defendants in one suit is not objectionable; but this is a very different question from that whether, merely because many actions at law arise out of the same transaction or occurrence, and depend on the same matters of fact and law, all may proceed or be proceeded against jointly in one suit in chancery; and it is believed that it has never been so held, and never will be, in cases like those here involved. Where each of several parties may proceed in equity separately, they are permitted to unite and make common cause against a common adversary, and one may implead in one suit in equity many who are his adversaries, in a matter common to all in many cases, but never when the only ground of relief sought is that the adversaries are numerous, and the suits are for that not in itself a matter for equity cognizance. Attention to the distinction mentioned will resolve all difficulties in considering the many cases on this subject. There must be some recognized ground of equitable interference, or some community of interest in the subject matter of controversy, or a common right or title involved to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity in order to be joined in one suit; and it is not enough that there "is a community of interest merely in the question of law or of fact involved," etc., as stated by Pomeroy in section 268. Although he asserts that this early theory has long been abandoned, he fails utterly to prove it. An examination of the cases he cited under section 256 et seq. will show this to be true. The opinion of the justice (Harlan) in *Osborne v. Wisconsin Cent. R. R. Co.*, 43 Fed. Rep. 824, does support the text of Pomeroy, and cites 1 Pomeroy's Equity Jurisprudence, sections 245, 255, 257, 268, 273, and *Crews v. Burcham*, 1 Black, 352, 357. We are content with what has already been said as to the text of Pomeroy, and affirm that not one of his citations sustains his conclusion and the language of Harlan, J., in the case cited; nor does *Crews v. Burcham*, 1 Black, 352, 357, sustain the language of Justice Harlan. It belongs to the class of cases where each party might have brought his

bill and all who had a common cause were permitted to make common contest in chancery with their adversaries who were united by a common tie.

The decision of the case in which Harlan, J., gave his support to the doctrine of Pomeroy is not complained of, but the opinion is not justified by any case with which we have been made acquainted. The case was one in which each might have brought his separate bill to quiet title, and all concerned were permitted to unite in one bill against their common adversary; and so it is believed will be found all the cases on this subject. Certainly those relied on by Pomeroy are of this character. Those cited in the note to section 269, in which he asserts most broadly the doctrine we combat, are: *Kees v. Denver*, 10 Col. 112; *Carlton v. Newman*, 77 Me. 408; *De Forest v. Thompson*, 40 Fed. Rep. 375; *Osborne v. Wisconsin Cent. R. R. Co.*, 43 Fed. Rep. 824; *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135; *New York etc. R. R. Co. v. Schuyler*, 17 N. Y. 592; *Sheffield Waterworks case*, L. R. 2 Ch. 8; and the case of the complicated contract, *Black v. Shreve*, 7 N. J. Eq. 440. The case in 43 Fed. Rep. 824 has already been noticed *supra*. The opinion in the case in 10 Colorado quotes the language of Pomeroy's Equity Jurisprudence, section 269, but the case was one where one or more plaintiffs may sue in equity for the benefit of all others similarly situated.

Carlton v. Newman, 77 Me. 408, affirms the jurisdiction of equity to enjoin the collection of an illegal tax for the purpose of preventing multiplicity of suits, where the entire levy, affecting all tax-payers, was illegal. It appears to be exceptional, and to rest on peculiar grounds, not applicable to the case before us. The opinion cites Pomeroy's Equity, section 269, but seems to rest on the proposition that the whole tax was illegal.

The case of *De Forest v. Thompson*, 40 Fed. Rep. 375, was that of a plaintiff exhibiting a bill to set aside a sale of land, and vacate deeds made in pursuance of it, against numerous parties, all of whom claimed by separate parcels, but under the proceeding attacked was void. A bill might have been exhibited against each one separately, and it was held to be proper to unite all in one suit. That was clearly right; but Jackson, J., in his opinion, concurred in by Harlan, Justice, cited 1 Pomeroy's Equity Jurisprudence, sections 245-269,

inclusive, which we have shown to be unsupported by any case of authority.

The case of *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135, is where a few persons, as representatives of a class consisting of many, exhibited a bill in behalf of all, and lends no countenance to the proposition for which it is cited. The cases of *New York etc. R. R. Co. v. Schuyler*, 17 N. Y. 592, *Sheffield Waterworks case*, L. R. 2 Ch. 8, and *Black v. Shreve*, 7 N. J. Eq. 440, furnish no sort of support to the text of the author, and it is confidently claimed that every case that can be found, if entitled to any consideration, will be seen to be one resting on some other principle than that for which it has been cited in the connection now under review. And, while judges have, in various instances, cited and sometimes quoted Pomeroy, in the language above characterized as unsupported, in every instance, we think, the case will be found not to call for it, but to be resolvable, independently of it, upon other grounds of equitable interference, and, in our opinion, not one of the learned courts which have cited or quoted Pomeroy in the way mentioned would sustain this bill if it was before it for decision. There is danger that by frequent repetition and piling up assertions—judges citing and quoting text-books, and text-writers citing the cases thus referred to them—a false doctrine may acquire strength enough to dispute with the true; but we do not believe that any accumulation of dogmatic assertions and citations and quotations can ever establish the proposition that a defendant sued for damages by a dozen different plaintiffs, who have no community of interest or tie or connection between them, except that each suffered by the same act, may bring them all before a court of chancery in one suit, and deny them their right to prosecute their actions separately at law, as begun by them. It has never been done. There is no precedent for it, and, while this is not conclusive against it, it is significant and suggestive. If it is true, as stated by Pomeroy, and some quoting him, that mere community of interest in matters of law and fact makes it admissible to bring all into one suit in chancery, in order to avoid multiplicity of suits, all sorts of cases must be subject to the principle. Any limitation would be purely arbitrary. It must be of universal application, and strange results might flow from its adoption. The wrecking of a railroad train might give rise to a hundred actions for damages, instituted in a dozen different counties, under our

law as to the venue of suits against railroad companies, in some of which executors or administrators, or parents and children might sue for the death of a passenger, and, in others, claims would be for divers injuries. If Pomeroy's test be maintained, all of these numerous plaintiffs, having a community of interest in the questions of fact and law, claiming because of the same occurrence, depending on the very same evidence, and seeking the same kind of relief (damages), could be brought before a chancery court in one suit to avoid multiplicity of suits! But we forbear. Surely the learned author would shrink from the contemplation of such a spectacle; but his doctrine leads to it, and makes it possible.

The learned counsel for the appellee here felt the difficulty of the possible result of the doctrine contended for, and sought to limit its application to controversies about property, excluding those for injuries to be redressed by the estimation of juries; but, as we have said, any such restriction is arbitrary and inadmissible. If preventing multiplicity of suits is such a good thing as to justify bringing into one suit all who are interested in the same questions of law and fact, it is needful that its benefits shall be extended to all cases where it can be applied, and not restricted in its beneficent operation. It should have full sway in all classes of cases. The sole object, we are told, of the doctrine, is to prevent multiplicity of suits by uniting all who have a common interest in the same questions in one suit, and it is quite as important to effect this in one class of cases as another; and, as actions against railroad companies are quite numerous these days, it is of especial concern to prevent multiplicity in this class of cases. Therefore, if the doctrine advanced were sound, it would have to be applied wherever the conditions prescribed exist—that is, wherever many are interested in the same questions of fact and law. That this is inadmissible must be apparent.

The case of *Board of Supervisors v. Deyoe*, 77 N. Y. 219, contains a good illustration of what we have said. In that case the suit against numerous parties was maintained, because it combined elements of jurisdiction in each of the cases of interpleader, bill of peace, and cancellation of written instruments.

The recovery of damages for a tort or breach of contract does not pertain to courts of chancery, which decree damages only in a very limited class of cases, or under peculiar circumstances, or as an incident to some other relief: 1 Pom-

eroy's Equity Jurisprudence, sec. 112; 2 Story's Equity, sec. 799. Even this learned author, Pomeroy, does not say that the existence of numerous suits for damages by a tort or breach of contract, where each case depends on the same questions of fact and law, may be drawn into chancery in one suit, and no case has been found to warrant it. Every case cited by Pomeroy, and by the learned and diligent counsel in this case, has been examined, and may be disposed of on some other principle acted on by courts of chancery than that contended for, and necessary to sustain the bill in this case. Every case is resolvable on some well-recognized principle of equity procedure, and not one sustains this bill.

The cases repudiating the doctrine contended for are numerous. We do not cite them, for it is unnecessary in view of the fact that not a case has been found in England or America to sustain this bill.

No question as to mistake of jurisdiction between courts of law and chancery, within the contemplation of section 147 of our constitution, arises in this case, for, if we had only one forum armed with full power to administer all remedial justice, joinder of all these parties in one action would not be admissible: Bliss on Code Pleading. This author says, in section 76: "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the down-flow of the water, and may unite to restrain or abate it as a nuisance, but they cannot hence unite in an action for damages; for, as to the injury suffered, there is no community of interest. There is no more a common interest than though a carrier had, at one time, carelessly destroyed property belonging to different persons, or the lives of different passengers;" thus putting the very case we have. The supreme court of California has cited with approval this very section.

We thus confront Pomeroy with an equally intelligent author, and a decision by the supreme court of his own state, at war with his views on this subject, if, indeed, it is true that he would uphold this bill, which we do not believe.

We have written so much to combat error, supported by a distinguished author, and which has had a misleading influence, which should be counteracted before further injury results from it, as far as in our power to do it.

Reversed, and injunction dissolved.

EQUITY WILL NOT INTERFERE TO PREVENT MULTIPLICITY OF SUITS, WHEN: See extended note to *Woodward v. Seely*, 50 Am. Dec. 450. Equity will not entertain jurisdiction when the only object is to obtain a consolidation of actions, or to save the expense of separate actions, or where the claim of right rests on a mere question of law: *Murphy v. Mayor etc.*, 6 Houst. 108; 22 Am. St. Rep. 345, and note; *Southern Michigan etc. Lumber Co. v. McDonald*, 57 Mich. 292.

SCOTT v. STATE.

[70 MISSISSIPPI, 247.]

HABEAS CORPUS—VOID JUDGMENT.—If from the record it appears that the defendant was convicted by a jury of eleven persons only, the verdict and judgment must be treated as void on *habeas corpus*. This result cannot be avoided by extrinsic evidence to the effect that there were in fact twelve jurors, and the name of one of them was omitted from the record through a clerical error.

Pegram and Banks, for the appellant.

T. M. Miller, attorney-general, for the state.

WOODS, J. The petition of relator avers that he is in the custody of the sheriff of Warren county, who holds him as the agent of the keeper of the state prison, and to whom said sheriff is about to deliver him, to undergo imprisonment pursuant to the judgment of the circuit court of said county, and that such judgment is a nullity, because relator says it was founded upon a verdict rendered against him by eleven men.

The return of the sheriff, amongst other matters showing his authority for relator's detention, states that the judgment of said circuit court (meaning the record of said court) shows that the relator was tried by eleven jurors, but that this seeming irregularity was a clerical error on the part of the clerk of the court, who omitted the name of one juror in making his entry of the names of the jury selected and sworn to try the issue between the state and the defendant on a charge preferred of burglary and larceny.

On hearing before the judge at chambers the records of the court were produced, and it affirmatively and conclusively appeared that a jury of eleven men, whose names are set out in the record, tried the issue and rendered a verdict against the defendant, and that upon this conviction the judgment of the court was pronounced. The state was then permitted to introduce the clerk of the court, who testified, over relator's objection, that the said jury was composed of twelve men, but

that the name of one, giving it, was omitted from the record by a clerical error.

The relator was remanded to the custody of the sheriff to undergo the punishment prescribed in the judgment pronounced against him, and from this action of the judge he appeals.

There can be no controversy as to the soundness of the doctrine that "errors or irregularities in proceedings behind the judgment cannot be inquired into on *habeas corpus*, and that the writ of *habeas corpus* was never designed to be a writ of error, by which to revise final judgments." The difficulty arises, not in the statement of the general rule, but in its application to particular cases. Mere reversible error will not be examined into on *habeas corpus*, and the party must be driven to his direct appeal, the proper mode for the rectification of irregularities. But for incurable, radical, fatal defects, plainly and indisputably manifest of record, relief should be granted, even on *habeas corpus*.

The error complained of is incurable by any supplementary oral proofs. It is not an irregularity merely. It is not an omission of a fact from the record which presumption may be invoked to supply. It is a fatal defect, affecting the jurisdiction of the trial court. The constitutional right to trial by twelve men must be secured to every defendant, and a verdict by six men, or eleven men, is absolutely void; and a judgment founded on such nullity must necessarily be itself a nullity. The court undoubtedly had jurisdiction of the person of the relator and of the subject matter, and ordinarily no other questions will be considered on *habeas corpus*; but in the present instance we see indisputably that by the intervention of an unauthorized agency, whereby the defendant's guilt of the crime laid to his charge was established, the jurisdiction of the court was broken and lost. There was no power to pronounce judgment, because there was no verdict of guilt on which to base it. In our view the relator stands just as if he had not been tried at all. The verdict is a nullity, and the judgment upon it is a nullity.

The judgment below will be reversed, but the prisoner will not be discharged. He has not yet been tried, and will therefore be remanded to the custody of the sheriff of Warren county, to be held to answer the charge of burglary and larceny originally preferred against him.

HABEAS CORPUS WILL NOT LIE TO CORRECT ERRORS of trial courts: *Ex parte Mitchell*, 104 Mo. 121; 24 Am. St. Rep. 324, and note; *In re Graham*, 74 Wis. 450; 17 Am. St. Rep. 174, and note; *Barton v. Saunders*, 16 Or. 51; 8 Am. St. Rep. 261, and note; *Ex parte Kenney*, 105 Mo. 535; *Ex parte Noble*, 96 Cal. 363; *Ex parte McKnight*, 48 Ohio St. 588; *In re Bion*, 59 Conn. 372. See also the notes to the following cases: *Morrill v. Morrill*, 23 Am. St. Rep. 106; *In re Morris*, 7 Am. St. Rep. 515, and the extended note to *Commonwealth v. Lecky*, 26 Am. Dec. 40. Irregularities in drawing a grand jury cannot be inquired into on *habeas corpus* by the party indicted: *Ex parte Worrie*, 28 Fla. 371. The writ will not issue to review the errors of a committing magistrate who has jurisdiction: *Turner v. Conkey*, 132 Ind. 248; 32 Am. St. Rep. 251, and note. See also *Ex parte Prince*, 27 Fla. 196; 26 Am. St. Rep. 67, and note.

ILLINOIS CENTRAL RAILROAD Co. v. SMITH.

[70 MISSISSIPPI, 344.]

ATTACHMENT—GARNISHMENT OF EXEMPT WAGES IN ANOTHER STATE.—

Wages due and payable in this state to the employee of a railroad corporation, resident and doing business here, and here exempt from execution cannot be garnished in another state, so as to defeat the exemption laws of this state.

ATTACHMENT.—SITUS OF DEBT FOR PURPOSE OF GARNISHMENT is in the state in which the debtor and creditor are both resident, and in which the contract creating the debt was made, and is payable.

S. E. Packwood and Mayes and Harris for the appellant.

Price and Sternberger, for the appellee.

WOODS, J. The appellee is a mechanic, the head of a family, and a resident of this state. He is employed as such mechanic by appellant in its shops at McComb City, in this state. The debt sued for is wages due from appellant to appellee under such employment. By the terms of the contract made at said McComb City the wages sued for were payable at that place, and amount to less than one hundred dollars. Under our law these wages are exempt from garnishment or other legal process. The appellant is a corporation, doing business and resident in this state. We have, then, both creditor and debtor residents of this state; the sum sued for due under a contract made in this state, by the terms of which the wages are to be paid in the state; the creditor is a mechanic, the head of a family, and entitled to the exemption of wages, to an amount not exceeding one hundred dollars, from garnishment or other legal process.

In bar of a recovery or in abatement of this suit appellant pleaded that it had been summoned in a court in the state of

Iowa, in an attachment suit began there against the appellee by one A. M. Dunkel, and had made answer showing an indebtedness due appellee of fifteen dollars, and that said suit in Iowa was yet pending and undetermined.

From the brief of the very candid and able counsel for appellant we are led to believe that this is a collusive attachment suit in Iowa, and that some Mississippi creditor, who cannot make the money due by Smith, the appellee, in our courts, because of our exemption laws, is really the plaintiff in attachment in Iowa. If this appeared in the record we could affirm the judgment of the court below without remark, as we know of no court which has ever lent any countenance to such collusive effort to defeat the exemption laws of the state of residence of the real creditor and his debtor. In the absence of any evidence in the record on this point we address ourself to the sufficiency of the plea of appellant on general principles.

Will attachment lie in a foreign state for the debt sued for in this action on the facts hereinbefore stated? There is some real conflict—and much confusion not reaching the proportions of actual conflict—in the decisions on the subject. Much of this confusion, and some of the conflict, has arisen out of a misapprehension of the real nature of the question. With a clear misapprehension of the character of the controversy several of the courts of last resort in the United States have misled themselves and misled others by inveighing against supposed attempts to give extraterritorial effect to exemption laws. The suggestion that this is the question involved is wide of the mark. It is really this question: Shall the state give its exemption laws intraterritorial force in cases like the one at bar? Shall railroad corporations, doing business and resident of this state, be regarded and treated in this and like cases just as natural persons? The natural person, resident in this state, is not garnishable in a foreign jurisdiction for a debt due and payable here. This is declared, and advisedly, to be settled law in the United States in *Bush v. Nance*, 61 Miss. 237. The appellant is a resident of this state, and the fact that it may also be a corporation and resident in other states may not operate to abrogate our exemption laws founded in beneficent public policy, in so far as railroad corporations may be affected by them.

Furthermore it is demonstrably certain that the situs of

the debt sued for in this action is in Mississippi. The creditor and debtor are both resident here; the contract creating the debt was made here; by its terms, payment is to be made here; the garnishee in the foreign attachment proceeding is resident here. Can it be seriously contended that the courts of this state have not exclusive jurisdiction of the debt, and that the courts of other states are without jurisdiction, and that the sum disclosed by the garnishee, in a foreign attachment, as due in the state of his residence and the residence of his creditor is not liable to condemnation in such proceeding? In this case, the debt is not within the jurisdiction of the foreign court, but here, at the residence of the creditor and place of payment under the contract of its creation: *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524; *Nye v. Liscombe*, 21 Pick. 263; *Lovejoy v. Albee*, 23 Me. 414; 54 Am. Dec. 630; *Missouri etc. Ry. Co. v. Sharitt*, 43 Kan. 375; 19 Am. St. Rep. 148; *Drake v. Lake Shore etc. Ry. Co.*, 69 Mich. 168; 18 Am. St. Rep. 382; *Green v. Farmers' etc. Bank*, 25 Conn. 452; *Sawyer v. Thompson*, 24 N. H. 510; *Lawrence v. Smith*, 45 N. H. 533; 86 Am. Dec. 183; *Reno on Nonresidents*, 152 et seq.

The numerous decisions which are cited and quoted as authority for the view opposed, beginning with the case of *Embres v. Hanna*, 5 Johns. 101, and running down as late as the case of *East Tennessee etc. R. R. Co. v. Kennedy*, 83 Ala. 462, 8 Am. St. Rep. 755, will be found, on critical examination, to be, in the main, not in necessary conflict with our view of the true doctrine.

We are not to suppose rashly that the courts of Iowa will proceed to judgment against the appellant, as garnishee in the attachment suit there pending, on a full presentation of the facts of the case; but, if they shall, it will be another illustration of liability to hardship, now and then, to litigants, growing out of conflict of laws in different jurisdictions. Better this hardship to a corporation having more than one domicile than a rule which would strip all laborers and mechanics in railway employment of the wise provisions of a humane exemption law, and, virtually, largely abrogate our policy and legislation on the subject of exemptions to heads of families in railroad service.

Affirmed.

ATTACHMENT—GARNISHMENT IN ONE STATE OF WAGES EXEMPT IN ANOTHER.—Garnishment proceedings cannot be maintained in one state to evade the exemption laws of a sister state and thus deprive a laborer of the benefit

of the laws of the latter state to protect his wages from seizure, when he resides in that state: *Drake v. Lake Shore etc. Ry. Co.*, 69 Mich. 168; 13 Am. St. Rep. 382, and note. For a discussion of the garnishment of a debt exempt in the state where it was created and the creditor resides, see extended note to *Missouri Pac. Ry. Co. v. Sharitt*, 19 Am. St. Rep. 145, and see also the extended note to *Mumper v. Wilson*, 2 Am. St. Rep. 240. But in *Carson v. Railway Co.*, 88 Tenn. 646, 17 Am. St. Rep. 921, it was held that a resident of Tennessee sued in another state cannot obtain the benefit of exemption secured to him by the Tennessee statutes, nor can his garnished debtor obtain it for him; and see the note to that case.

GARNISHMENT—SITUS OF DEBT.—The situs of a judgment for the purpose of garnishing it is only in the state wherein the judgment creditor resides: *Reiter v. Harbut*, 81 Wis. 24; 29 Am. St. Rep. 850, and note.

McKENZIE v. SHOWS.

[70 MISSISSIPPI, 383.]

REAL PROPERTY.—GROWING TREES are part and parcel of the land on which they grow. Therefore a deed purporting to pass title to all the merchantable timber of certain dimensions on an entire homestead, and specifying no definite time for its removal is a conveyance of an interest in the land and invalid unless the wife joins in its execution.

HUSBAND AND WIFE.—CONVEYANCE OF INTEREST IN HOMESTEAD EXECUTED BY HUSBAND ALONE is invalid for any purpose, and therefore cannot have the effect of passing to the grantee an estate in reversion, to take effect upon and after a proper sale of the homestead by the husband and wife jointly.

McKENZIE claimed certain growing timber on a homestead under a deed executed by one Yawn, without the joinder of his wife. After the execution of this deed, the homestead was conveyed by Yawn and wife to Collins, to whom it passed to the appellee, Shows. McKenzie entered on the land, and proceeded to cut the timber, while Shows was in possession, and was restrained from further operations by an injunction, which was finally made perpetual by the court below. Section 1258 of the Mississippi Code of 1880 provides that "no mortgage, deed of trust, or other encumbrance upon the homestead exempted from execution shall be valid or binding unless signed by the wife of the owner, if he is married and living with his wife."

R. H. Thompson, for the appellant.

Shannon and Hardy, for the appellees.

WOODS, J. In this state, for more than thirty years, and since the opinion of this court in *Harrell v. Miller*, 85 Miss.

700, 72 Am. Dec. 154, it has been settled law that trees growing upon land are part and parcel of the realty; that "the term land embraces, not only the soil, but its natural products growing upon and affixed to it."

Was the sale of all the merchantable timber, of certain dimensions, on the entire homestead, with an indefinite time for its removal, a conveyance of an interest in the land, or an encumbrance upon it, and invalid, and of no force, because of the failure of the wife to join in the deed? The growing trees are a part of the realty, and may be, in case the lands are what are denominated timber lands in contradistinction to other lands called agricultural lands, a very valuable part of the realty. In a readily supposable case, the sale and removal of the entire forest growth would practically destroy the value of the realty. In the case at bar it is alleged in the bill, and not denied in the answer, that the lands in question would be only worth about one-half as much as they are, if the timber should be taken off.

Under our own decision referred to, the sale of the growing timber is a sale of a part and parcel of the land itself. It is a conveyance of an interest in the land—in the present case, an important interest. By all authorities, it is an encumbrance upon the homestead. Says Cooley, J., in *Post v. Campau*, 42 Mich. 90, "anything is an encumbrance which constitutes a burden upon the title," citing a number of instances, and, continuing, "they permanently reduce the value of the title conveyed." In *Prescott v. Trueman*, 4 Mass. 627, 8 Am. Dec. 246, Parsons, C. J., employs this language: "We are of opinion that every right to or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an encumbrance." In *Cathcart v. Bowman*, 5 Pa. St. 317, it is held that the conveyance by deed of the timber on land, with the privilege of cutting it during a certain term, was an encumbrance of the land, and violated the covenant of warranty in a subsequent deed of the land itself to a third person. The like doctrine has long prevailed in New York and Pennsylvania.

But it is useless to multiply authorities. The question cannot be regarded as unsettled in our courts, if *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 154, is followed to its logical conclusion. The growing trees are part and parcel of the land, by that case, and the sale of such trees, and especially

the wholesale conveyance shown in the case at bar, with the large diminution in value of the homestead, is clearly and inevitably the sale of an interest in the land, and constitutes an encumbrance upon it.

There is no estate in reversion expectant upon which the appellants can enter upon the proper sale of the homestead by the husband and wife jointly, for the reason that the attempted conveyance and encumbrance of the husband alone, in the sale by deed of the timber, was absolutely invalid to convey any right or title. Collins, the purchaser of the timber, acquired nothing by the invalid conveyance from the husband alone.

We are not inclined to eat away a wise and most beneficent statute, designed for the welfare and support and comfort of wives and children, by ingrafting any exceptions upon it. The law must be upheld and enforced as written, and this we do by declaring Yawn's deed to the timber on the homestead an encumbrance upon the title, and invalid for any purpose.

Affirmed.

REAL PROPERTY, WHAT IS.—The fruits of trees, perennial bushes, and grasses growing from perennial roots, are, while unsevered from the soil, considered as belonging to it and a part of the realty: *Sparrow v. Pond*, 49 Minn. 412; 32 Am. St. Rep. 571, and note; *Combs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236.

HOMESTEAD.—POWER OF ONE SPOUSE TO CONVEY: *Alexander v. Jackson*, 92 Cal. 514; 27 Am. St. Rep. 158; extended note to *Alt v. Bankholser*, 12 Am. St. Rep. 683. A deed of the homestead by the husband alone is void: *Gleason v. Spray*, 81 Cal. 217; 15 Am. St. Rep. 47, and note; *Smith v. Pearce*, 85 Ala. 264; 7 Am. St. Rep. 44, and note.

RICHMOND AND DANVILLE R. R. Co. v. BURNSED.

[70 MISSISSIPPI, 437.]

RAILROAD COMPANIES—PERSON TRAVELING ON A FREIGHT TRAIN.—One is not a passenger entitled to free transportation on a train because of stock carried thereon if he merely had a verbal agreement to buy some of the stock when the train reached a certain station, and then only if he could give the security required; had no contract with the railroad company; neither saw the agent of the company, nor went near him when the contract for the carriage of the stock was made; and his name was not mentioned to the agent, nor inserted in the bill of lading.

RAILROAD COMPANIES—DUTY TO TRESPASSERS ON TRAINS.—A railroad company is not answerable to a trespasser on a train for negligence, and owes him no duty other than that of doing him no wanton or willful injury.

ACTION to recover damages for injuries received by Burnsed in leaping from a freight train which was in imminent danger of coming into collision with another train. The apparent peril was sufficient to absolve the plaintiff from the charge of contributory negligence, and the only dispute was, whether the plaintiff when he received the injuries was a passenger.

A. F. Fox, for the appellant.

Southworth and Stevens, and Calhoun and Green, for the appellee.

WOODS, J. The appellee's theory of the case, as disclosed in his declaration, is that he was a passenger on a freight train by virtue of a contract of carriage of stock made with the appellant, under which he was entitled to free transportation because of his ownership of a part of the mules. The appellee's evidence utterly fails to support his theory. It is manifest that the stock was owned by Gresham and Lordon, and that the contract of carriage was made with Gresham alone. It is equally certain that Gresham's name alone appeared in the bill of lading, and that he alone was by the contract entitled to the free transportation. It is admitted that all of the animals were consigned to Gresham, at Indianola. By the appellee's own testimony, he had merely a verbal agreement to buy some of the mules, after Indianola had been reached, and then only if he could make the security required. It is idle to discuss the question of ownership. The appellee conclusively fixes that in Gresham. By his own evidence, too, he is shown to have been improperly on the train. He had no contract with the railroad; he was not even seen by the railroad agent; he did not go near him when the contract was made; his name was not mentioned to the agent, and was not inserted in the bill of lading, as must have been done to entitle him to transportation. He was a trespasser, pure and simple. He was attempting to get a free ride from Winona to Indianola when he received the lamentable injury complained of. The learned judge in the trial court properly declared to the jury that appellee was not a passenger, and was not entitled, under the rules of the defendant company, or by virtue of any contract with the company, to ride on that train. He was a naked trespasser, and his right to a recovery must be determined by the wan-

tonness or willfulness of the company's servants in the matter complained of. The company owed this trespasser no duty other than that of doing him no wanton or willful hurt. The company was not answerable to him for negligence, for it was under no obligation, contractual or other, to carry him safely. Gross negligence, by the statute law of this state, is made the test of a right to recovery by a passenger on a freight train, and we have never anywhere seen that a passenger and a trespasser occupy the same relations to the carrier, or that they stand upon the same ground. The company was under no contract, expressed or implied, to safely carry appellee. He was attempting wrongfully to secure a ride without paying for it, and he must be held to have assumed all the perils incident to the ride. Under settled rules of public policy, railway companies are not to be made liable for injuries received by trespassers upon their trains, unless the injury is inflicted under circumstances indicating wantonness or willfulness in the servants of the companies. The rule seems to be almost universally recognized and approved, and is in consonance with reason and right.

Toledo etc. Ry. Co. v. Brooks, 81 Ill. 245, 292; *Chicago etc. R. R. Co. v. Michie*, 83 Ill. 427; *Toledo etc. Ry. Co. v. Beggs*, 85 Ill., 80; 28 Am. Rep. 613; *McCauley v. Tennessee etc. R. R. Co.*, 93 Ala. 356; *Louisville etc. Ry. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155; *Powers v. Boston etc. R. R. Co.*, 153 Mass. 188; *Brown v. Missouri etc. Ry. Co.*, 64 Mo. 536; *Duff v. Allegheny R. R. Co.*, 91 Pa. St. 458; 36 Am. Rep. 675, and *Gardner v. New Haven etc. Co.*, 51 Conn. 143; 50 Am. Rep. 12 were all cases involving the rights of intruders in cars, trespassers on trains, and not trespassers on tracks or premises, and the foregoing doctrine, as stated by us, was applied as recognized law. The doctrine is to be found in the text-books generally.

Can it be seriously insisted that a trespasser upon a train occupies a better position than trespassers on tracks? If degrees in trespass could be established, it occurs to us that the train trespasser is a greater wrongdoer than the track trespasser. He like the track trespasser is entitled to exemption from wanton or willful injury, or from injury that might and should have been avoided by the railway company after seeing the danger of the trespasser's situation. This court has repeatedly so held: *Mobile etc. R. R. Co. v.*

Stroud, 64 Miss. 784; *Dooley v. Mobile etc. R. R. Co.*, 69 Miss. 648; and *Louisville etc. Ry. Co. v. Williams*, 69 Miss. 631.

The able counsel for appellee is mistaken in supposing that the case of the *Vicksburg etc. R. R. Co. v. Phillips*, 64 Miss. 693, is in conflict with the preceding opinion, or that it is authority for the doctrine that negligence alone will entitle a trespasser to recover for injuries received without fault on the part of the railroad company's servants after seeing the trespasser's peril. In that case, a little boy of tender years was enticed upon a train side-tracked at Jackson by the music of a band playing thereon, and was cursed and driven out by a railroad employee after the train had got in rapid motion, whereby, in an effort to escape the abusive and profane and threatening employee, the child fell under the wheels of the train, and was horribly mutilated. The second instruction asked for the railroad in that case sought, virtually, to constrain a verdict for the company by excluding from the jury's consideration the peril of the child, and the railroad's knowledge of that peril, when the child was being cursed and driven from the car, as well as all inquiry as to whether but for the employee's outrageous behavior in the perilous situation of the child at the time the injury would not have been averted. An instruction should be applicable to the facts of the particular case; and the second instruction of defendant, refused by the court in the *Phillips* case, did not meet this sensible requirement.

That the appellee was not a passenger by invitation or license from the conductor is too clear for controversy. When the appellee and his two companions overtook the train at the tank, the remark of the conductor was expressive of his surprise at the appearance of all the persons as passengers under the contract of carriage for the carload of mules. He did not then know what rights they, or any of them, had acquired under that contract, and he had no opportunity or occasion to examine the bill of lading, which served the purposes of a ticket in such case, and ascertain whether appellee was rightfully on the train, before the accident occurred. He simply did his duty in courteously receiving a professed passenger—one holding himself out as a passenger—and in courteously treating him, in the absence of knowledge that the ostensible passenger was, in fact, a mere trespasser.

The peremptory instruction asked by the appellant should have been given, and, for the error committed in refusing it,

the case must be reversed. This view obviates the necessity of passing upon any of the other contentions.

Reversed.

RAILROADS—DUTY TO TRESPASSERS ON TRAIN.—A trespasser on a railroad train attempting to obtain a free ride without the consent of the company cannot recover for an injury received, in the absence of proof of gross negligence amounting to willful or wanton misconduct on the part of such carrier: *Chicago etc. R. R. Co. v. Mehlack*, 131 Ill. 61; 19 Am. St. Rep. 17, and note with the cases collected; *Reary v. Louisville etc. Ry. Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497, and note; *Hendry v. Kansas City etc. R. R. Co.*, 45 Kan. 377; *Railroad v. Meacham*, 91 Tenn. 428. A common carrier of passengers is bound to exercise only ordinary care toward trespassers and those refusing to pay fare: *Higley v. Gilmer*, 3 Mont. 90; 35 Am. Rep. 450, and note; *Whitehead v. St. Louis etc. Ry. Co.*, 99 Mo. 263.

WEIGHTMAN v. LOUISVILLE, NEW ORLEANS, AND TEXAS RAILWAY COMPANY.

[70 MISSISSIPPI, 563.]

RAILROAD COMPANIES—SICK PASSENGERS.—If plaintiff's son was taken seriously ill, and while thus sick was received as a passenger on one of defendant's trains; and both the ticket agent of defendant and the conductor of the train were apprised of his helpless condition, and also informed that he was traveling by rail and not by steamboat because it was important for him to reach his home without delay; and the conductor promised to give him the necessary attention during the journey and to have him carried from the train at his place of debarkation; and when the son arrived at his destination he was unconscious and unable to take care of himself; and the conductor failed to awake him and have him removed from the train, on which he was left till it reached a small wayside station with no accommodations, about thirty miles farther on, where he was put off the train at two o'clock in the morning with no one to care for him, and left in the same helpless and neglected condition for nearly forty hours, continually growing worse; and was then taken back to the station at which it was intended that he should have disembarked and, although medical aid was at once summoned, died soon afterwards, the railway company is answerable in damages.

George Anderson, for the appellant.

Mayes and Harris, for the appellee.

WOODS, J. The case, on its facts presented by the declaration, is widely different from that of *Sevier v. Vicksburg etc. R. R. Co.*, 61 Miss. 8, 48 Am. Rep. 74. In that case the plaintiff got on a train of the railroad company at Vicksburg, to be transported to Jackson. Before reaching Jackson, the plaintiff, who had gotten on the train while sick with a fever,

notified the conductor of the train that he was sick and drowsy, and wished to sleep, but feared he might not awake at Jackson, his point of debarkation. The conductor thereupon told plaintiff that he might safely go to sleep, and that he should be awakened at Jackson. The plaintiff accordingly lay down and slept, and gave no thought to being awake when the train should reach Jackson, and neither roused himself nor was aroused by the conductor at Jackson, but was carried four miles east of that station while so asleep and sick, when the train was stopped, the plaintiff permitted to get off at night in the woods, and walk back to Jackson.

In the case at bar the passenger was received into and upon the train by the ticket agent's and conductor's consent and agreement, after having been informed of his serious illness and his inability to care for himself, and of the necessity there would be, on the railroad's part, to have him assisted from the car when the train should arrive at Vicksburg, the place of his debarkation. The declaration alleges that the passenger, "being violently ill, was overcome by weakness, drowsiness, and unconsciousness to such an extent that when the train upon which he was a passenger arrived at Vicksburg he was totally unconscious thereof;" that the conductor negligently failed to have the passenger awakened and put off, but permitted him to remain on the train, without any attention or care given him, and carried him to a small station, called Ingleside, about thirty miles south of Vicksburg, where he was put off the train, about 2 o'clock at night where there was no one to take care of him, or to protect him in his then condition, and he was permitted to remain in the depot at Ingleside, without care or attention, from 2 A. M. Tuesday to 5 P. M. on the Wednesday following—about forty hours—when he was placed upon a north-bound train of defendant's, and carried back to Vicksburg; that on thus reaching the house of his father at Vicksburg, medical aid was at once summoned, but it was found to be too late, and he was pronounced to be beyond hope of recovery, and very soon thereafter died. It is also alleged that, by reason of his having no care and attention during the forty hours he was left at the station-house at Ingleside, he grew very much worse, and that death would not have occurred but for the negligent, wanton, and reckless conduct of defendant.

How wide the limits stand between the one case and the other—the case of Sevier and the case of Weightman—the

preceding brief statements of fact will vividly make to appear. In the one case, a man, not sick enough to make his condition known before or on entering the train, takes passage, and, before reaching his destination (the whole trip a short one of about forty miles only), tells the conductor that he has fever and is drowsy, and wants to sleep, and secures the conductor's promise to rouse him at Jackson. The conductor—under no sort of obligation, contractual or otherwise, to keep his promise—forgets the passenger until four miles out from Jackson, when he permits the passenger to leave the train and return to his destination. In the other case—the one at bar—the passenger is received into and upon the train after his sick and helpless condition had been made known to the ticket agent and the conductor, together with the reasons for desiring to have him carried by rail rather than by steamer, and the necessity for the attention of the railway employees on his journey and in his removal from the train at Vicksburg, his point of debarkation, and after their agreement to give him needed care on the way, and to have him carried from the train. He is not cared for or carried from the train, though unconscious at the time, but is carried thirty miles farther south, and put off at 2 o'clock A. M. in a little wayside depot, with no one to care for him, and is permitted there to remain, without care or attention, until nearly forty hours later, when he is carried back to Vicksburg to die.

That the wanton, reckless, inhuman conduct of the defendant in putting an almost dying man from its train, under the revolting circumstances set out in the declaration in this case, creates liability on the wrongdoer's part we do not hesitate to affirm. It was the wanton exposure to almost certain death by the railroad company of one not a trespasser—a passenger, to whom it owed a duty; at least the duty which common humanity proclaims, and which the general law of civilized Christendom echoes, not to wantonly or recklessly injure another. Trespassers on trains and tracks, wrongdoers and swindling dead-beats, may not be willfully or wantonly injured, or subjected to imminent risks of deadly peril. This humane doctrine is imbedded in our laws; it is rooted in all laws of every enlightened kingdom or commonwealth under the wide circuit of the sun.

Is authority thought to be needful to support so plain and just a rule of conduct? They are at hand, and abundant. Says Beach, in his admirable little compendium of *The Law*

of Railways: "A railway company must treat such of its passengers as are sick or infirm with humanity and consideration." In the case of *Conolly v. Crescent City R. R. Co.*, 41 La. Ann. 57, 17 Am. St. Rep. 389, this rule is declared with emphasis. In the *syllabus*, which Fenner, J., who delivered the opinion of the court, approves, it is said: "Although a common carrier of passengers owes obligations to its well passengers as well as to those who are sick, and is bound to protect the rights of both, and, although, when the condition of one passenger, from sickness or otherwise, is such as to be inconsistent with the safety, health, or even comfort of his fellow-passengers, regard for the rights of the latter will authorize the carrier to terminate the carriage by excluding him; yet, this right cannot be exercised arbitrarily or inhumanly, or without due care and provision for the safety and well-being of the ejected passenger." In this case, the ejected passenger had fallen, helpless and almost insensible, to the floor of the car, vomiting severely. His condition was offensive to other passengers. Thinking him drunk, the car-driver, with the help of a passenger, removed Conolly from the car and laid him down in the open street, where he remained for four hours, on a bleak day in December, and was at length removed by the police authorities to the hospital, where he died the next day. Miserable as is this case on its facts, how far short of the reckless and wanton disregard of all laws displayed in the case at bar does it fall!

In delivering the opinion of the court in the case of *Louisville etc. R. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, where it appeared that Sullivan was drunk, and unable or unwilling to pay his fare, and was ejected by the conductor, and exposed to freezing weather, while in a helpless condition, whereby his toes, some of his fingers and part of his heel were frozen, and necessitated their amputation, Lewis, J., said: "The right, generally, of railroad companies to put off their trains persons who refuse to pay their fare when requested by the conductor, may be conceded, but does it follow that this right may be exercised in such manner, under such circumstances or against a person in such mental or physical condition as that death or serious bodily harm will necessarily, or even probably, result from putting him off? It is true that appellee, by refusing to pay his fare, became, technically, a trespasser, but it is well settled that a party may, in some cases, recover for the gross negligence of another, notwith-

standing he may have been a trespasser upon the rights of the other at the time he received the injury." See, too, the cases cited by the learned judge in his opinion. To the same effect will be found *Shenandoah Valley R. R. Co. v. Moose*, 83 Va. 827; *Atchison etc. R. R. Co. v. Weber*, 83 Kan. 543; 52 Am. Rep. 543; *Columbus etc. Ry. Co. v. Powell*, 40 Ind. 37; *Haley v. Chicago etc. Ry. Co.*, 21 Iowa, 15; *Great Western Ry. Co. v. Miller*, 19 Mich. 305.

Judgment of court below reversed, demurrer overruled and case remanded for further proceedings.

RAILROADS—DUTY TO SICK PASSENGERS.—A sick person is entitled to more care from a railroad company than one in good health and under no disability: *Sheridan v. Brooklyn etc. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490, and note. The contrary doctrine is maintained in *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478; and see the extended note to the latter case discussing this question. See also *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542; 12 Am. St. Rep. 443, and *Conolly v. Crescent City R. R. Co.*, 41 La. Ann. 57; 17 Am. St. Rep. 389.

WILSON v. STATE.

[70 MISSISSIPPI, 505.]

INDICTMENT, IMPROPER INFLUENCE TO PROCURE.—Grand jurors should be permitted to act without bringing any undue influence to bear upon them. If an attorney of the party claiming to be injured by an alleged crime goes before the grand jury as a prosecutor, for the purpose of securing an indictment, the indictment, if secured, must be set aside on a plea in abatement thereto.

INDICTMENT for forgery. The defendant pleaded in abatement that an attorney was employed to further the prosecution; that he brought witnesses to give evidence before the grand jury; that he assisted the district attorney in the preparation of the indictment; that the indictment was finally found and presented by his procurement, and in the absence of the district attorney; that he was not acting at the time either as assistant district attorney or as district attorney *pro tem.*, nor in anywise concerned with the case except as the attorney of the party injured by the alleged crime. The allegations of the plea were substantially proved, Finley, the attorney, merely denying that he had been employed to assist in the prosecution. He testified that he appeared before the grand jury because requested to do so by the district attorney, and that he used no undue influence to procure the present-

ment of the indictment. Two of the jurors testified that Finley's remarks in nowise influenced them, and one of these two also expressed an opinion that those remarks were equally without influence on the jury as a whole. Upon the conclusion of the testimony in support of the plea in abatement the court gave the jury a peremptory instruction against the defendant, who was then tried and convicted. Other facts appear in the opinion.

Clarke and Clarke, and Calhoun and Green, for the appellant.

Frank Johnston, attorney-general, for the state.

COOPER, J. The court erred in instructing the jury to find for the state upon the issue joined upon the defendant's plea in abatement. On the facts disclosed in evidence, the verdict on that plea should have been for the defendant. It is unquestionably shown that Mr. Finley, who was the attorney for the telegraph company alleged to have been defrauded, or attempted to be, by the forgery charged against the defendant, was before the grand jury, as a private prosecutor, for the purpose of securing the indictment of the accused. It is true Mr. Finley states that he was not employed by the company in the prosecution. He testified: "I did it of my own motion. I was interested in seeing this defendant convicted, because I thought he was a great scoundrel."

It is a serious mistake to suppose that the right of one accused or suspected of crime to the orderly and impartial administration of the law begins only after indictment. Immunity from prosecutions for indictable offenses, except by presentment by the grand jury, is declared and preserved by the organic law of this and all the other states, and though, by reason of the secrecy of the proceedings before that body, its action is seldom brought in review, it cannot be doubted that one whose acts are there the subject of investigation is as much entitled to the just, impartial, and unbiased judgment of that body as he is to that of the petit jury on his final trial, nor that it is as essential before the one body as the other that private ill-will or malevolence shall be excluded.

The candid statement by Mr. Finley that he went before the grand jury because he thought the appellant to be a great scoundrel, and therefore desired his indictment and conviction, presents the precise reason why he should not have gone before the jury, for it is just such influences the law forbids.

He was not a witness before that body, and was not an officer having any duty to perform touching the matter under examination. His purpose must have been to advance in some way the prosecution; and this is precisely what the law prohibits to be done. The case is covered by the decision in *Durr v. State*, 58 Miss. 425; *Welch v. State*, 68 Miss. 341.

The judgment is reversed, and cause remanded for a new trial.

GRAND JURY.—INDICTMENT, QUASHING BECAUSE IMPROPERLY SPOURED: See *Commonwealth v. Woodward*, 157 Mass. 516; 34 Am. St. Rep. 302, and note; and extended note to *Commonwealth v. Green*, 12 Am. St. Rep. 900.

CRIGHTON v. DAHMER.

[70 MISSISSIPPI, 602.]

INJUNCTION WILL NOT ISSUE TO RESTRAIN CRIMINAL PROCEEDINGS unless they are instituted by a party to a suit already pending before the court and for the purpose of trying the same right that is in issue there.

W. J. Lacey, for the appellant.

Orr and Stockett, for the appellees.

COOPER, J. The appellant exhibited his bill in chancery against Henry, Peter, Andrew, and John Dahmer. He avers that John Dahmer is the owner of a certain farm now occupied by complainant, and on the twenty-sixth day of November, 1891, leased the same to one Delmont for the term of three years, beginning January 1, 1892, and delivered possession thereof to Delmont, who entered and occupied and held the same until November 14, 1892, when he assigned the remainder of his term to complainant, and put him in possession of the farm; that complainant continued in the quiet and peaceable possession of said farm until the — day of —, 1892, when, during his temporary absence, the defendants, Andrew and Peter Dahmer, forcibly entered upon the premises and, by violence, broke into the residence then occupied by him, in which action they were advised and directed by the defendant, Henry Dahmer; that complainant afterwards, and in the absence of said trespassing defendants, re-entered and reoccupied, and yet holds possession thereof; that the defendant, Henry Dahmer, pretending at first to act as the agent of the defendant, John Dahmer, and afterwards

as the lessee of the premises under the said John, caused complainant to be arrested on a charge of trespass, and now threatens to continue to have him arrested from day to day as a trespasser because of his occupancy of said premises and his refusal to deliver possession thereof to said defendant, Henry; that his purpose in so doing is to compel complainant to surrender possession of the premises or to expend large sums of money in defense of said criminal prosecutions; that Henry Dahmer if he has, or believes he has, any just right to the possession of said premises, could test the same by a civil proceeding; but that knowing that he has no such right, he uses his pretended lease from the defendant, John, as a foundation to vex, harass, and annoy and oppress complainant by resorting to criminal prosecutions against him; that said pretended lease casts a cloud upon the title of complainant to his term in the premises and, in equity, should be canceled and annulled.

The prayer for relief is that said lease-claim by Henry shall be canceled, and that an injunction may issue prohibiting the said defendants, or either of them, from instituting other criminal prosecutions against complainant, or from entering upon the premises without due process of law. An injunction was granted as prayed, and the defendants moved to dissolve the same upon the face of the bill. This motion was sustained, and the injunction dissolved, from which order the complainant has been granted an appeal to this court by the chancellor in order that the principles involved may be settled by this court.

From the statement of the cause it is apparent that the defendants, Andrew and Peter Dahmer, have or claim no sort of interest in the property in controversy, and there is no averment by which it appears that the defendant, John, claims any present right to the possession thereof. As to these defendants, the bill is a pure and simple effort to enjoin the institution and prosecution of criminal prosecutions against complainant. The relief sought as against the defendant, Henry, is somewhat further supported by the fact that a property right is in dispute between him and complainant as to which a court of equity has jurisdiction to afford relief. If the complainant may not sustain his right to enjoin the defendant, Henry, from the prosecution of criminal charges against him *a fortiori*, may he not find relief in equity by injunction against such prosecutions by the other defendants.

A somewhat extended examination of the approved text-writers and of judicial decisions has disclosed no suggestion among the writers that the jurisdiction invoked may be exercised by courts of equity, nor have we found a decided case by which it is upheld, other than two cases decided by the judges of the district courts of the United States, sitting in equity upon the circuit, in which the jurisdiction of equity to enjoin criminal prosecutions has been pressed to great, and, as we think, unwarrantable, lengths. The cases to which we refer are *Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561, and *Lottery Co. v. Fitzpatrick*, 3 Woods, 222. In the first of these cases prosecutions under a state law against unlawful retailing were enjoined, upon the ground that the complainant was engaged in interstate commerce; and, in the other, prosecution under a statute of Louisiana forbidding the vending of lottery tickets on the drawing of a lottery, on the ground that the state, by compact with the complainant, had granted to it the right to do the forbidden act. In neither case was there a pending suit involving property rights, but the bill in each was exhibited for the primary and original purpose of enjoining criminal prosecutions in the state court, and necessarily involved the power and jurisdiction of a court of equity to draw to itself the investigation of the guilt or innocence of the complainant of the offense, which was or would be the question for investigation of the courts of the state having jurisdiction thereof.

We think no English case can be found of modern times, and no case in the United States, other than the two above noted, in which a court of equity has enjoined the prosecution of criminal proceedings. In *Mayor v. Pilkington*, 2 Atk. 802, the complainants had exhibited their bill in chancery to establish their sole right of fishery in the river Ouse. While the suit was pending they caused the agent of the defendant to be indicted in the sessions at York, where there were judges, for breach of the peace in fishing in their liberty. On motion of the defendant, Lord Chancellor Hardwicke made an order restraining the plaintiff from proceeding at the sessions till the hearing of the cause. In *Kerr v. Corporation of Preston*, L. R. 6 Ch. Div. 467, Jessel, M. R., declared that, with the exception of *Mayor v. Pilkington*, 2 Atk. 802, there was no instance in which a court of equity had interfered in criminal cases, and that in *Saull v. Browne*, L. R. 10

Ch. 64, he had declined to follow that "doubtful decision," and on appeal his decision was affirmed.

Where an officer of a court, acting under its direction, tore down some houses which were the subject of litigation, one of the parties to the suit was restrained from proceeding criminally against him: *Turner v. Turner*, 15 Jur. 218; 2 Eng. L. & Eq. 130. The vice-chancellor, Lord Cranworth, declared the distinction to be an obvious one, for, while the court had no jurisdiction over an indictment in general, as over a mere civil proceeding, yet when a court made an order in a cause over which it had jurisdiction, its execution could not be made the ground of a criminal prosecution by one of the parties, for the officer would be punished by the court if he failed to comply therewith. *Mayor v. Pilkington*, 2 Atk. 802, and *Turner v. Turner*, 15 Jur. 218, 2 Eng. L. & Eq. 139, are the only English cases with which we are acquainted in which the prosecution of criminal proceedings has been restrained, and in each the relief was granted by a mere order of the court, acting upon parties to a pending suit in which the court was proceeding, and not by injunction under the seal of the court. In *Saull v. Browne*, L. R. 10 Ch. 64, the court refused to make an order restraining one of the parties from at the same time prosecuting a criminal proceeding. As against general criminal prosecutions, relief has uniformly been refused: *Montague v. Dudman*, 2 Ves. Sr. 396; *Holderstaffe v. Saunders*, 6 Mod. 16; *Attorney-General v. Cleaver*, 18 Ves. 211.

The supreme court of the United States, *In re Sawyer*, 124 U. S. 200, reviewed the decisions in England and America, and declared that there was no jurisdiction in chancery to enjoin prosecutions for crime, except in cases in which the order is made to restrain a party to a suit already pending before the court, and to try the same right that is in issue there. Sawyer, who had been arrested for contempt of the injunction of a federal court, was discharged on *habeas corpus*, upon the ground of an entire want of power in the court to grant the injunction.

There are many cases to be found, proceeding upon an obvious and clear distinction, in which courts of equity have enjoined acts affecting property rights, notwithstanding the fact that such acts might also be ground for indictment. To this class are to be assigned the cases of *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217; *Spinning Co. v. Riley*, L. R.

6 Eq. 551. In the latter case the chancellor said: "The truth, I apprehend, is that the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property." To the same class belong numerous other decisions which rest upon the same principle, which is clear and easily distinguishable from that of enjoining the ordinary criminal prosecutions which affect the property rights more or less indirectly, and in which no jurisdiction can be taken in courts of equity. In the cases of *Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561, and *Lottery Co. v. Fitzpatrick*, 3 Woods, 222, authorities for the exercise of the jurisdiction in the one class were cited as upholding it in the other, but it is notable that in neither case was a decision cited, either English or American, in which the precise point involved had been ruled in favor of the jurisdiction. In *Montague v. Dudman*, 2 Ves. Sr. 396, Lord Chancellor Hardwicke declared he was unable to discover a precedent for the exercise of the power, and said: "I will go by Littleton's rule, that it is a good argument, an action lies not, because one was never brought. I never knew a bill of this kind, and therefore will not make the precedent."

There are a few cases in which the enforcement of void municipal ordinances, the execution of which directly affected property rights, have been enjoined, and criminal prosecutions before the municipal authorities restrained: *City of Atlanta v. Gate City Gas-light Co.*, 71 Ga. 106; *Shinkle v. City of Covington*, 83 Ky. 420. But, with the exception of *Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561, and *Lottery Co. v. Fitzpatrick*, 3 Woods, 222, we have found no decisions of any court that a bill in equity may be exhibited for the single purpose of enjoining criminal prosecutions, and against these decisions stand the unbroken line of decisions of all courts of authority.

Judgment affirmed.

Enjoining Crimes and Criminal Prosecutions.

In early times the English court of chancery, not without much protest on the part of the common-law courts, occasionally issued injunctions to restrain the commission of certain criminal acts. This jurisdiction seems to have been confined to cases in which other tribunals were too weak to protect the poorer and more helpless classes of the community against the power of the great nobles. The ground upon which the interference of the chancellor was invoked in the petition was that, by means of some lawless combinations, or by the influence which wealth and rank were able to exert, the parties against whom relief was sought were in a position to pervert the ad-

ministration of justice in the common-law courts: Pomeroy's Equity Jurisprudence, 1; Spence Eq. Jurispr., c. 4, *Moses v. Mayor etc. of Mobile*, 52 Ala. 198; *Stewart v. Board of Supervisors*, 83 Ill. 341; 25 Am. Rep. 397.

The reasons for exercising this rather anomalous jurisdiction disappeared when the common-law courts became fully capable of controlling and repressing such acts of violence and outrage, and the attitude and powers of a court of equity in regard to criminal matters for the last four or five hundred years may be stated in the words of Mr. Justice Gray, in the recent case of *In re Sawyer*, 124 U. S. 200. "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes and misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government."

The theory as to the functions of courts of equity is so fully understood that all the attempts which have been made in modern times to bring criminal matters within their cognizance have proceeded upon the ground that the case was one in which the rights of property were involved. The following discussion, therefore, will merely be an examination of the principles upon which the courts have acted in dealing with applications for relief on this ground.

Modifications of the General Principle.—So far as a succinct and comprehensive rule can be gathered from the cases, which are far from being harmonious, it may be stated thus: Equity will not interfere to prevent the commission of criminal acts, if the injury which will result to property therefrom is merely a consequence, however natural and inevitable, of such acts; but if the acts, although criminal in the sense that the state has imposed a penalty for their commission, are primarily and essentially an injury to property, preventive relief may be granted within the same limits and under the same conditions as where the element of criminality is entirely absent, that is, an injunction will not issue unless the damage threatened is irreparable and the evidence clear and convincing.

Consequential Injuries to Property Not a Ground for Enjoining Crimes.—That every crime is certain to produce more or less injury to the pecuniary interests of private individuals is sufficiently obvious. But this fact has never been considered enough to confer jurisdiction upon a court of chancery to interfere for the purpose of restraining even that comparatively small class of crimes which admit of preventive relief. The refusal of equity to take cognizance of such acts is sufficiently explained by the fact that the state has provided a certain procedure for ascertaining the guilt or innocence of persons accused of crime, and may be presumed to have intended that this procedure should be exclusive of all others. In many, or rather most, instances, moreover, the justification for equitable interference would, on general principles, be wanting. Nearly all crimes which are not directly injurious to property may be referred to the category of breaches of the peace, and if such a breach is apprehended the courts of common law are competent to furnish all the preventive relief which is possible under the circumstances—that is, the offender may be bound over to keep the peace. Upon this ground a court of equity refused to assume jurisdiction of a case in which the agents of a railroad company were threatened with personal violence, if they attempted to proceed with the construction of the road

across land which the company had acquired by regular proceedings in eminent domain: *Montgomery etc. R. R. Co. v. Walton*, 14 Ala. 207. So also relief was denied in a case where the petitioner was apprehending an entry upon his premises by the defendant for the purpose of removing certain fixtures, the court remarking that reasonable force might be used to repel any attack, or that the defendant might be bound over to keep the peace: *Hamilton v. Stewart*, 59 Ill. 330. *A fortiori*, in the case of those acts which are made misdemeanors for the purpose merely of securing the welfare and comfort of the community or of promoting morality, a court of equity will decline to interfere, for here the statute, which creates the offense, must be regarded as forbidding by implication any other mode of restraining it than the one expressly specified. The leading case on this subject is *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. St. 401. There the petitioners sought to restrain the running of street-railway cars on Sunday, in violation of the law, alleging that they were "deprived of the right of enjoying the Sabbath as a day of rest and religious exercise, free from all disturbance; that they were prevented by the running of the cars from "engaging peaceably in the worship of God in their accustomed places of worship;" and that "their churches and residences were being deteriorated in value." The court held that this complaint amounted merely to a charge of violating the provisions of the Sunday Law, and described nothing but the consequences which that law was designed to prevent. It was therefore not a case of special injury to the rights of the plaintiffs, which, on the principles regulating the interference of equity to restrain a public nuisance at the suit of a private party, entitled them to the relief asked for. "The deprivation of these privileges" (rest, and quiet, and undisturbed worship) "is the sum of the complaint," said Judge Thompson, "and this bill is essentially, therefore, a bill to enforce by injunction a penal statute. That is not our province, especially at the suit of a private party." . . . "One reason why equity cannot interfere is that there is a remedy at law by statute, and we must presume it adequate, for it is what the law has provided and no more." In regard to the allegation that the property abutting on the streets through which the railroad ran was depreciated in value, the court thought the question too doubtful for an injunction to issue until the fact was ascertained by a trial at law. The case is, therefore, not inconsistent with that of *First Baptist Church v. Schenectady etc. R. R. Co.*, 5 Barb. 79, in which an injunction was issued, under a somewhat similar state of facts, to restrain the running of a steam railroad, the deterioration of the value of certain property for church purposes being established to the satisfaction of the court. On the authority of *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. St. 401, it was recently held that liquor-selling on Sunday, being a misdemeanor, could not be enjoined: *State v. Schweichardt*, Missouri Supreme Court, Feb. 22, 1892; and the principle upon which it was decided was recently mentioned with approval by Chief Justice Fuller in *World's Columbian Exposition v. United States*, 56 Fed. Rep. 654. In *State v. Uhrig*, 14 Mo. App. 413, it was held that the fact that the keeping of an unlicensed dramshop might amount to a public nuisance did not give a court of equity jurisdiction to interfere, although in a proper case the suppression of such a nuisance may be procured by injunction. (See below.) In *State v. Crawford*, 28 Kan. 726, on the other hand, it seems to be implied in the opinion of the court that if the maintenance of such a business did amount to a public nuisance equity would, as a matter of course, enjoin it, and the injunction was denied merely on the ground that the statute creating the offense had prescribed an adequate and far more effectual remedy by abatement. It is not

easy to see that this statute had any larger meaning than simply to declare that the ordinary legal remedy for a public nuisance should be applied in this particular instance, apart from the question whether it was what the common law would regard as a nuisance or not. The remedy specified was, so far as can be gathered from the opinion, no more adequate than abatement usually is, and it would seem to follow that an injunction should not have been denied solely on the ground of the existence of a more complete remedy. A perfectly sufficient reason for the refusal to grant the writ was that none of the special features which are deemed necessary to create the right to equitable interference were present in the case. *State v. Ubrig*, 14 Mo. App. 413, appears to us to express a more correct doctrine.

Crimes Directly Affecting Property Rights.—The principle upon which courts of equity interfere in cases involving acts which are not merely criminal, but also directly injurious to property, is apparently this: They ought not to be ousted from their peculiar functions of preventing irreparable damage to property, merely because, in exercising such functions, they may also prevent the commission of a crime. Stated in this form, the principle is obviously the natural and necessary antithesis of the rule discussed in the preceding subdivision. It is the essential character of the act which entitles or forbids a court to restrain its omission. This principle is illustrated in the leading case of *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217." Kosuth, the famous Hungarian patriot, while in exile in England caused to be manufactured, by Messrs Day and Sons, a firm of lithographers, a large quantity of notes, which, though not made in imitation of any notes circulating in Hungary, purported to be receivable as money in every Hungarian state and public pay office and to be guaranteed by the state of Hungary. The plaintiff, as king of Hungary, sued to have these notes delivered up, and to restrain the manufacture of any more of the same kind, alleging that the issue of such notes would injure the rights of the plaintiff by promoting revolution and disorder, would injure the state by the introduction of a spurious circulation, and would thereby also injure the plaintiff's subjects. On this state of facts, it was held by Lord Chancellor Campbell, and the lords justices of appeals, that, although the court had no jurisdiction to restrain the commission of acts which only violate the political privileges of a foreign sovereign, the manufacture of the notes should be restrained, the foundation of the judgment being, that the plaintiff, as representing his subjects, was entitled to relief on account of the pecuniary injury which a spurious circulation would inflict on them.

In the case of *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, complainant alleged that certain members of a trades union, who had left their employer's service on account of some dispute about wages, undertook to intimidate other persons from taking their places, and, as a part of their scheme, published various notices, warning all workmen not to seek for employment with the same master until the dispute was settled. Vice-Chancellor Malins granted an injunction restraining the publication of the notices, on the ground that the acts of intimidation complained of, though punishable as a statutory offense, were yet within the jurisdiction of equity, as tending to the destruction of property. This decision was subsequently mentioned with disapproval in *Prudential Assurance Co. v. Knott*, 10 L. R. Ch. 147, in so far as it tended to support the doctrine that chancery could interpose to prevent the publication of a libel.

Injunctions Against Purprestures and Nuisances.—The most numerous class of cases in which the principle that equity may interfere to prevent any act

primarily an injury to property, even if a crime is thereby prevented, is that of purprestures and public nuisances. The jurisdiction is based partly on the ground that, in the words of Lord Eldon in *Attorney-General v. Cleaver*, 18 Ves. 211, "an indictment for nuisance, though for what may be called a criminal act, has for many purposes a civil aspect," and partly on the ground that, although the legal remedy of abatement is available a court of equity can supply a much more efficacious remedy by not merely insuring the removal of an existing nuisance, but by preventing those which are threatened from coming into existence. The first-named consideration indicates the reason why the jurisdiction of equity has been extended to this particular crime. The second consideration is merely an application of the general rule that equity will interfere in all cases within the possible sphere of its jurisdiction, for the purpose of preventing irreparable damage and obviating a multiplicity of suits. The English court of chancery is said to have taken cognizance of public nuisances as far back as the reign of Elizabeth, 2 Story's Equity, sec. 201; but it would appear from the very cautious expressions of Lord Hardwicke in *Baines v. Baker*, Amb. 158, and of Lord Eldon in *Attorney-General v. Cleaver*, 18 Ves. 211, that the jurisdiction had gradually been disused to a great extent during the sixteenth and seventeenth centuries. In the latter case it was said that the instances of the interposition of the court upon the subject had been confined and rare, and that most of the precedents for preventive relief had occurred in the court of exchequer, to the equitable side of which application had occasionally been made by the attorney-general to restrain public nuisances. Lord Eldon admitted the jurisdiction of the court in such cases, but held, on the authority of Hale's treatise, *De Portibus Maris*, that if the nuisance were not upon the king's soil or in a navigable river, but merely a nuisance to all the king's subjects, an injunction could not be granted without the verdict of a jury as to the question of fact. Accordingly he refused to enjoin the operation of a soap manufactory until after the trial of an indictment against the defendants. But whatever unwillingness equity judges may have felt at one time to interfere in this class of cases has long since disappeared, and injunctions against public nuisances are now recognized both in this country and in England as among the most beneficent of the instruments by which chancery is enabled to supply a more adequate remedy than the law affords: *Attorney-General v. Forbes*, 2 Mylne & C. 123; *Attorney-General v. Sheffield Gas Co.*, 3 De Gex, M. & G. 304; 19 Eng. L. & Eq. 639; *Attorney-General v. Johnson*, 2 Wils. Ch. 87; *Attorney-General v. Cambridge*, 16 Gray, 247; *People v. New York Gas Light Co.*, 64 Barb. 65; *Attorney-General v. Boston Wharf Co.*, 12 Gray, 553; *Commonwealth v. Railway Co.*, 24 Pa. St. 159; 62 Am. Dec. 372; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91; *Bradley v. People*, 56 Barb. 72; *Attorney-General v. Cohoes Co.*, 6 Paige, 133; 29 Am. Dec. 755; *Attorney-General v. Hudson River R. R. Co.*, 9 N. J. Eq. 526; *Commonwealth v. Rush*, 14 Pa. St. 186.

Unlawful Exercise of Corporate Privileges.—The usurpation or misuse of corporate franchises is an act which, like a nuisance, has both a civil and a criminal aspect: *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371. Up to the time when that case was decided the extent of the right of a court of equity to supplement the ordinary legal remedy of *quo warranto* by furnishing preventive relief seems to have been very imperfectly defined. The opinion of Chancellor Kent is an extremely cautious one, and he appears inclined to deny the existence of equitable jurisdiction except where the *ultra vires* act sought to be enjoined amounted to a nuisance or a breach of trust. Neither of these

features being predicable of the case before him, he refused to restrain an insurance company from carrying on the business of banking in contravention of a state law. In view of later decisions, the doctrine of the learned chancellor must be regarded as untenable, except perhaps in those cases in which private trading corporations are concerned: *State v. Saline Co. Ct.*, 51 Mo. 350, 11 Am. Rep. 454. An extended discussion of the subject would be beyond the scope of the present note. A large collection of authorities sustaining the rule, that an injunction to restrain *ultra vires* acts will be granted at the suit of the state or of an individual whose interests are specially affected will be found in the note to Pomeroy's Equity Jurisprudence, section 1345, and in the elaborate opinions of Justice Shepley in *State v. Saline Co. Ct.*, 51 Mo. 350, 11 Am. Rep. 454, and Chief Justice Ryan in *Attorney-General v. Railroad Cos.*, 35 Wis. 425. The last-named case was complicated by the fact that the statute fixing railroad tolls, to which it was sought to compel the defendants to conform, not only provided civil remedies for persons injured by overcharges, but also imposed penalties upon the agents of the companies who violated the statute. The court, however, held that this fact was not sufficient to cut off the remedy by injunction. We are unable to agree with the strictures of Mr. High upon this case: High on Injunctions, sec. 20, note. The acts complained of were a plain violation of property rights conferred by a statute, and it seems to us perfectly consistent with the fundamental principle upon which equity exercises its restraining powers to maintain that the court could not be debarred from enjoining those acts merely because the injunction would have the indirect result of aiding the enforcement of certain penal provisions in the same statute. The decision is, we think, clearly in line with *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217, and the cases which support the jurisdiction of chancery in regard to public nuisances.

Injunctions Against Defamatory Publications.—In *Gee v. Pritchard*, 2 Swanst. 402, Lord Eldon briefly disposed of an application for an order to restrain the publication of a libel by the remark that such an act was a crime, and that he had therefore no jurisdiction to prevent it. In the recent case of *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 19 Am. Rep. 310, the rule is laid down with more particularity by Chief Justice Gray in the following words: "The jurisdiction of a court of chancery does not extend to cases of libel, or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract." The following cases amply sustain this statement: *Huggonson's case*, 2 Atk. 469; *Seeley v. Fisher*, 2 Swanst. 581; 11 Sim. 581; *Fleming v. Newton*, 1 H. L. Cas. 363; *Martin v. Wright*, 6 Sim. 297; *Raymond v. Russell*, 143 Mass. 295; 58 Am. Rep. 137. In *Huggonson's case*, 2 Atk. 469, it was, however, remarked that, if the libel was also a contempt of court, it would be cognizable by a court of equity, and in *Kilcut v. Sharp*, 52 L. J. N. S. Ch. 134, an injunction was issued restraining the publication of letters abusing the plaintiff during the progress of a trial, the reason assigned being that they were calculated to prejudice him in the trial. These exceptions to the general rule are plainly to be referred to the inherent power of all courts to restrain any conduct contrary to good discipline and likely to deprive litigants of their constitutional right to a fair trial.

As might be expected from the fact that defamation of character, or false representations as to the quality of a man's property, or as to his title thereto, are often extremely injurious to his pecuniary interests, the books contain

numerous instances of attempts to found a claim to equitable interference upon this circumstance. But the courts, in the case of this as of other crimes, have generally adhered to the broad principle that it cannot be enjoined merely because it tends to injure property: *Hammersmith etc. Co. v. Dublin etc. Co.*, 10 L. R. Eq. 235; *Brook v. Evans*, 29 L. J. Ch. 616; *Mulhern v. Ward*, 13 L. R. Eq. 619; *Secley v. Fisher*, 11 Sim. 581; *Covell v. Chadwick*, 153 Mass. 263; 25 Am. St. Rep. 625; *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70; 15 Am. Rep. 675; *Bell v. Singer Mfg. Co.*, 65 Ga. 452; *Chase v. Tuttle*, 27 Fed. Rep. 110; *Kidd v. Horry*, 28 Fed. Rep. 773; *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. Rep. 95. The one recognized exception to this rule is that which arises from the fact that a man has a property in his own name: *Maxwell v. Hogg*, L. R. 2 Ch. 307 (per Lord Cairns); *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217 (per Turner, L. J.). Accordingly in *Routh v. Webster*, 10 Beav. 561, an injunction was granted to restrain the publication of an advertisement falsely representing the plaintiff to be the director of a certain joint stock company. *Clark v. Freeman*, 11 Beav. 112, which enunciates a contrary rule, must now be regarded as overruled: See *Maxwell v. Hogg*, L. R. 2 Ch. 307.

Vice-Chancellor Malins, whose bold stretch of equitable jurisdiction in *Springhead Spinning Co. v. Riley*, 6 L. R. Eq. 551, has been already noticed, announced the comprehensive rule that the publication of any document tending to the destruction of property, or of professional reputation by which property is acquired, may be restrained: *Dixon v. Holden*, 7 L. R. Eq. 488. This decision was declared unsound in *Prudential Assurance Co. v. Knott*, 10 L. R. Ch. 142; but Vice-Chancellor Malins adhered to his opinion in *Rollins v. Hinks*, 18 L. R. Eq. 355. The question is now set at rest, so far as England is concerned, by the Judicature act, which has established the principle for which the learned judge had contended, and in the latter reports will be found several cases in which the jurisdiction thus conferred has been exercised. See *Thorley's Cattle Food Co. v. Massam*, 6 L. R. Ch. Div. 582; *Quartz Hill Consolidated Gold Mining Co. v. Beall*, 20 L. R. Ch. Div. 501; *Hill v. Hart-Davis*, 21 L. R. Ch. Div. 798; *Hermann Loag v. Bear*, 26 L. R. Ch. Div. 306; *Hayward v. Hayward*, 34 L. R. Ch. Div. 198; *Thomas v. Williams*, 14 L. R. Ch. Div. 864. It is, however, at the same time recognized that the jurisdiction is to be exercised with the greatest caution, and, as a general rule, only when the applicant satisfies the court that the statements in the publication sought to be enjoined are untrue: *Hill v. Hart-Davis*, 21 L. R. Ch. Div. 798; *Liverpool etc. Association v. Smith*, 37 L. R. Ch. Div. 170.

In this country the courts, proceeding upon general principles of jurisdiction, and unaided by statutes, have generally decided against the existence of a power to restrain publications calculated to injure a person's business: *Kidd v. Horry*, 28 Fed. Rep. 773 (per Justice Bradley); *Baltimore Wheel Co. v. Bemis*, 29 Fed. Rep. 95; *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; 19 Am. Rep. 310; *Raymond v. Russell*, 143 Mass. 295; 58 Am. Rep. 137. In *Emack v. Kane*, 84 Fed. Rep. 46, the circuit court for the northern district of Illinois, while accepting the general principle laid down in *Kidd v. Horry*, 28 Fed. Rep. 773, distinguished the case before it on the ground that the defendant threatened the plaintiff's customers with suits for infringement, if they purchased a certain patented article. This attempted intimidation being admittedly for the purpose of breaking up the plaintiff's business, gave him, in the opinion of the court, a right to preventive relief.

This ruling is directly opposed to that of *Bell v. Singer Mfg. Co.*, 65 Ga. 452; and *Chase v. Tuttle*, 27 Fed. Rep. 110.

Interference of Equity with Criminal Proceedings.—The general rule and its limitations may be stated in the words of Lord Eldon: "This court has originally no jurisdiction whatsoever, either to enjoin or regulate proceedings on an indictment; but circumstances may give that jurisdiction; where, for instance, the relators are the persons prosecuting the indictment, I should have a control by order personally affecting them, but I am not satisfied that I have the same control over these defendants, who have not come in." Historically, this abridgement of the right which the English court of chancery assumed to interfere with legal proceedings is partly to be explained by the extreme jealousy with which such interference was always regarded by the common-law judges, a jealousy of which we find a significant expression in the blunt remark of Chief Justice Holt in *Holderstaffe v. Saunders*, Cases temp. Holt, 6 Mod. 16: "Sure chancery would not grant an injunction in a criminal matter under examination in this court (queen's bench); and, if they did, this court would break it, and protest any that did proceed in contempt of it." But the principle also rests on the perfectly good and sufficient reason that the machinery of a court of equity is totally unfitted for the trial of crimes: *Poyer v. Village of Des Plaines*, 123 Ill. 111; 5 Am. St. Rep. 494; and that for all possible abuses in the course of any such trial the state has provided remedies which must be presumed to be adequate. Another objection to the exercise of equitable jurisdiction in such a case is that it would be an attempt to restrain the sovereign power in the name of which criminal proceedings are conducted: *In re Sawyer*, 124 U. S. 200; *Suess v. Noble*, 31 Fed. Rep. 855. Hence equity cannot entertain a bill to restrain the removal of a public officer: *In re Sawyer*, 124 U. S. 200; nor to stay the execution of an attachment for the commitment of a party adjudged guilty of contempt in disobeying a peremptory writ of mandamus: *Tyler v. Hamersley*, 44 Conn. 419; 26 Am. Rep. 479; nor to restrain a writ of mandamus or prohibition: *Montague v. Dudman*, 2 Ves. Sr. 396; nor to restrain the collection of costs under a judgment of a justice of the peace directing them to be paid by the prosecutor in a case where the defendant has been discharged. Under such circumstances there is a complete remedy by writ of certiorari, if the judgment is erroneous: *Gault v. Willis*, 53 Ga. 675.

Interference of Equity with the Enforcement of Penal Statutes and Ordinances.—It has been stated above that the ground upon which the interference of equity to restrain the commission of a crime is always invoked is that the crime in question tends to the injury of property, and that the courts have almost invariably declined to exercise jurisdiction for such a reason. A similar result has attended the numerous endeavors which have upon this ground been made to enjoin prosecutions to enforce penalties imposed by statutes or municipal ordinances for acts made criminal by their proceedings: *Poyer v. Des Plaines*, 123 Ill. 111; 5 Am. St. Rep. 494; *Moses v. Mayor etc. of Mobile*, 52 Ala. 198; *Burnett v. Craig*, 30 Ala. 135; 68 Am. Dec. 115. The rule, therefore, is that under ordinary circumstances a person who is accused of violating either statutes or ordinances cannot invoke the aid of equity for the purpose of staying or annulling the proceedings: *Kerr v. Corporation of Preston*, 6 L. R. Ch. Div. 463; *West v. Mayor etc. of New York*, 10 Paige, 539; *Minneapolis etc. Ry. Co. v. Milner*, 57 Fed. Rep. 276; *Moses v. Mayor etc. of Mobile*, 52 Ala. 198; *Medical Institute v. Hot Springs*, 34 Ark. 559; *Yates v. Village of Batavia*, 79 Ill. 500; *Portis v. Fall*,

34 Ark. 375; *Waters-Petree Oil Co. v. Little Rock*, 39 Ark. 412; *Devon v. First Municipality*, 4 La. Ann. 11; *Davis v. American Society for the Prevention of Cruelty to Animals*, 75 N. Y. 362; *Gaertner v. Fond du Lac*, 34 Wis. 497; *Phillips v. Mayor of Stone Mountain*, 61 Ga. 386; *Cohen v. Goldsboro Commrs.*, 77 N. C. 2; *Tyler v. Hamersley*, 44 Conn. 419; 26 Am. Rep. 479; *Spink v. Francis*, 19 Fed. Rep. 670; *Suess v. Noble*, 31 Fed. Rep. 855; *Joseph v. Burk*, 46 Ind. 59; *Hemsley v. Myers*, 45 Fed. Rep. 283; *Kansas City Cable Ry. Co. v. Kansas City*, 29 Mo. App. 89.

The general principle upon which an injunction is denied, although the prosecution may entail pecuniary loss, is thus stated in *Davis v. American Society for the Prevention of Cruelty to Animals*, 75 N. Y. 362: "If this action could be maintained in this case, then it could in every case of a person accused of a crime, when the same serious consequences would follow an arrest; and the trial of offenders, in the constitutional mode prescribed by law, could forever be prohibited. A person threatened with arrest for keeping a bawdy-house, or for violating the excise laws, or even for the crime of murder, upon the allegation of his innocence of the crime charged and of the irreparable mischief which would follow his arrest, could always draw the question of his guilt or innocence from trial in the proper forum. An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is *damnum absque injuria*, unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risk of such a damage by being a member of an organized society, and his compensation for such risks may be found in the general welfare which society is organized to promote."

On the other hand cases are not wanting in which judges have, for some special reason, disregarded the rule that the question of the validity of an ordinance or statute cannot be raised in an equitable proceeding instituted to restrain the enforcement of the penalty imposed. In the early case of *Wood v. City of Brooklyn*, 14 Barb. 425, an injunction was granted on the ground that the ordinance sought to be enforced was void on its face. This ruling was referred to as "the decision of an able judge" in *Davis v. American Society for the Prevention of Cruelty to Animals*, 75 N. Y. 362; but the court in the latter case avoided any direct expression of opinion as to its soundness, on the ground that the ordinance, with the enforcement of which it refused to interfere, was undoubtedly valid. The principle of *Wood v. City of Brooklyn* is supported by *Trustees of Louisville v. Gray*, 1 Litt. 147; *Shinkle v. Covington*, 83 Ky. 420; *Mayor of Baltimore v. Radecke*, 49 Md. 218; 33 Am. Rep. 239. In the first two of these cases, a court of equity enjoined prosecutions for obstructing a street, the defendant claiming to be the owner of the land alleged to be a part of the street, and compelled the city authorities to institute a suit to determine in whom the title subsisted. In the last case an injunction was issued restraining the enforcement of an ordinance imposing penalties for noncompliance with an order issued by a certain municipal officer requiring the removal of a steam-engine. The ground of the decision was that a steam-engine is not *per se* a nuisance, and that an ordinance which "committed to the unrestrained will of a single public officer the power to notify every person who employed one in the prosecution of any business in the city" was plainly so unreasonable as to be invalid. This case is severely criticised in *Kansas City Cable Ry. Co. v. Kansas City*, 29 Mo. App. 89, and it there pointed out that the earlier Maryland cases which are relied upon related to ordinances of a merely

civil character, for the paving of streets or the like. This criticism is perfectly just so far as it denies that there was any real precedent for the decision in the older rulings of the same court. The question involved was really a new one, and the court weakened the authority of the case by relying upon precedents which are clearly inadequate to sustain its doctrine. The broad principle upon which it might fairly have been rested is that laid down by Mr. Justice Field in his concurring opinion in the case of *In re Sawyer*, 124 U. S. 200: "In many cases, proceedings criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined in a court of equity." On principle there seems to be no objection to holding that all abuse of legal proceedings, whether criminal or civil, shall furnish a ground for equitable interference, wherever the rights of the applicant are clear and the proceedings are obviously nothing but a circuitous method of depriving him of his property. The law may furnish a remedy in such a case, but it can scarcely be affirmed, with any show of reason, to be an adequate remedy in all cases.

The same inadequacy, it is true, may and does frequently exist in cases where it is sought to enforce a penal ordinance, which is a *bona fide* exercise of the police power. But it is one thing to say that private interests must sometimes be sacrificed to the public welfare, when that welfare is aimed at by an honest enactment of that description, and quite another thing to say that a similar sacrifice should be acquiesced in, when a legislative body, under the pretense of seeking the good of that particular portion of society which is intrusted to its supervision, attacks the vested property rights of individuals. To such a case, it is submitted, the principle that equity disregards the form of a transaction and considers its real purpose and substance is distinctly applicable. A reasonable doubt as to the nature of the enactment would of course always be sufficient to stay the hand of a court of equity, and there is little danger that the public interests would ever be prejudiced, if the rule here suggested were acted upon. On the other hand it would seem to open the door to intolerable oppressions if a municipal council could attack property by an ordinance which was plainly invalid, and, by resorting to the flimsy subterfuge of couching the enactment in a penal form, drive the persons affected by it to the slow and often unsatisfactory remedies of legal procedure. There seems to be no reason whatever why a fraud of this description should be tolerated in a legislative body any more than in an individual; nor that a judge should deem himself precluded by the external form of legislation from acting up to the spirit of the great and salutary principle that the law will not suffer to be done indirectly anything which it forbids to be done directly.

The principle announced by Mr. Justice Field is still more plainly applicable to those cases in which courts have restrained the enforcement of ordinances which are valid on their face, as being enacted with reference to matters which are undeniably under the control of the municipal legislature, but which are invalid as an invasion of civil rights already vested under state or federal statutes: *Atlanta v. Gate City Gas-Light Co.*, 71 Ga. 106; *Lottery Co. v. Fitzpatrick*, 3 Woods, 222; *Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561; *Port of Mobile v. Railroad Co.*, 84 Ala. 115; 5 Am. St. Rep. 342; *City Council v. Louisville etc. R. R. Co.*, 84 Ala. 127. In *Port of Mobile v. Railroad Co.* the court announced the comprehensive principle that a municipal corporation could not, by the device of adding a penalty to an illegal or void ordinance, escape the grasp of a court of equity, and

enjoined the enforcement of a penal ordinance which would have the effect of impairing a valuable franchise, and of inflicting irreparable damage upon the plaintiff. In other words a law impairing the obligation of contracts is void, whether penal in form or not, and if a court of equity sees that the law is void for that reason, it will interfere by injunction, if the damage threatened by its enforcement would be irreparable. Both of these features, unquestionable invalidity and the certainty of irreparable damage, must be present, as was decided by the same court with reference to the ordinances passed upon in *Port of Mobile v. Railroad Co.* See *Forchner v. Port of Mobile*, 84 Ala. 126.

The court in the principal case was mistaken in supposing that the two cases from the Federal Reports upon which it comments are the only authorities for the exception to the general rule which they illustrate. These Alabama cases and *Atlanta v. Gate City Gas-Light Co.*, 71 Ga. 106, are equally strong and emphatic recognitions of the right of equity to interfere wherever an impairment of a contract will result from a penal law.

In some cases the interference of equity has been asked for on the ground of preventing a multiplicity of suits, as where the municipal authorities have continued to arrest an offender for repeated infractions of an ordinance, and he seeks to have such proceedings suspended, until the validity of the ordinance is determined in a court of law. Relief asked for on this ground alone has been very generally denied: *Poyer v. Village of Des Plaines*, 123 Ill. 111; 6 Am. St. Rep. 494; *Moses v. Mayor of Mobile*, 52 Ala. 198; *West v. Mayor of New York*, 10 Paige, 539. Still less can an injunction be granted on the ground that the offender has taken an appeal, after being once convicted: *Suess v. Noble*, 31 Fed. Rep. 855; *Levy v. Shreveport*, 27 La. Ann. 610. Apparently the consideration of public policy which underlies these decisions is that no one can rightfully claim permission to go on disobeying the command of a legislative body, which is presumably valid, and claim to be exempted from punishment for all offenses except the first, until the proper tribunal has pronounced the command to be a valid exercise of power. In New York, however, the prevention of a multiplicity of suits seems to be, to a limited extent, a sufficient ground for an injunction against proceedings of this kind: *Third Ave. R. R. Co. v. Mayor etc. of New York*, 54 N. Y. 150. There the defendants had commenced, in the justice's court, seventy-seven actions against the plaintiff to recover penalties, prescribed and imposed by a city ordinance, for running cars without a license. An injunction was issued restraining the defendant from prosecuting more than one action until the validity of the ordinance had been established, the reasons assigned being that the justice's court had no power to grant the relief sought, or to consolidate the actions, and that the prosecution of all the suits would be unnecessarily oppressive. It was considered that the case fell within the statutory power of courts of record, whenever several suits were pending in it by the same plaintiff against the same defendant for causes of action which might be joined, to order the same suits to be consolidated into one action: 2 New York Rev. Stats., 383, sec. 36. That power being conceived to include the power to order a consolidation of suits pending in a court upon which the same authority had not been conferred: *West v. Mayor etc. of New York*, 10 Paige, 539, was distinguished on the ground that the injunction there asked for was to restrain the proceedings absolutely, while in the case before the court the relief petitioned for was merely suspensory.

Criminal Proceeding by Parties to Suits Pending in Courts of Equity.—Whatever conflict and uncertainty there may be as to the general power of

a court of equity to interfere with criminal proceedings, the doctrine that such proceedings may be enjoined when they are instituted by persons who have already submitted their claims to a court of equity, and for the purpose of trying the same right that is in issue there, seems to be now recognized: *Mayor etc. of York v. Pilkington*, 2 Atk. 302; 9 Mod. 273; *Attorney-General v. Cleaver*, 18 Ves. 211; *Turner v. Turner*, 15 Jur. 218; *Attorney-General v. Hunter*, 1 Dev. Eq. 12; *Spink v. Francis*, 19 Fed. Rep. 670. In *Saull v. Browne*, 10 L. R. Ch. 64, the English court of appeals rendered a decision confining the application of the rule within very narrow boundaries. A suit had been instituted by the widow of a decedent against the defendant, charging him with certain acts of misconduct in his executorship, and especially with a collusive sale of the partnership interests of the decedent. Subsequently, while the suit was pending, the plaintiff took out a summons against the same defendant and a coexecutor on the charge of unlawfully conspiring to defraud her of her just share in the partnership business. On this state of facts, it was decided that the master of the rolls had rightly refused an injunction to restrain the proceedings. The court remarked that what was sought by the summons was different from anything that could be obtained in the chancery suit, the object of the summons being, not to obtain relief as to the property, but to obtain punishment for the defendants in their persons. In *Mayor etc. of York v. Pilkington*, 2 Atk. 302, 9 Mod. 273, it was pointed out, the same right would have been tried in both courts. In the later case of *Kerr v. Corporation of Preston*, 6 L. R. Ch. Div. 463, Sir George Jessel referred to *Mayor etc. of York v. Pilkington*, as a "doubtful decision," and said that with the exception of that case there was no instance in which a court of equity had interfered in criminal proceedings. This statement is too sweeping, for *Turner v. Turner*, 15 Jur. 218, is certainly such a case, and although the circumstances in *Attorney-General v. Cleaver*, 18 Ves. 211, did not directly involve the question, the language used by Lord Eldon shows that he regarded this as one of the established heads of equity jurisdiction. The learned judge, however, disclaimed any intention of denying entirely the existence of a power to interfere in this class of cases, and it may, perhaps, be regarded as settled by the weight of authority that the power does exist, and will be exercised within the narrow limits indicated in *Saull v. Browne*, 10 L. R. Ch. 64.

GREENVILLE COMPRESS AND WAREHOUSE CO. v. PLANTERS' COMPRESS AND WAREHOUSE CO.

[70 MISSISSIPPI, 669.]

CORPORATIONS—AGREEMENT TO CONSOLIDATE, WHEN ULTRA VIRES.—An agreement between two corporations to effect a consolidation thereof is *ultra vires* and invalid unless the power to consolidate is expressly conferred by the corporate charters.

CORPORATIONS—CONTRACT ULTRA VIRES, REMEDY UPON.—An *ultra vires* contract will not be specifically enforced in equity, nor will an action at law lie thereon; but if it has been partially or completely executed by either of the parties he may, by proceeding in the proper court, recover to the extent of the benefit received by the other party.

CORPORATIONS—ULTRA VIRES AGREEMENTS, PARTIAL EXECUTION OF.—Where a temporary injunction has been issued granting the prayers of

a bill which has been filed by a corporation, asking for an injunction to restrain another corporation from resuming the control of its business, and thus interfering with the action of a joint committee of management appointed as a preliminary to the execution of an illegal agreement to consolidate the corporations, and also for an account of moneys received by the defendant corporation from the time when it resumed control to the time when the bill was filed, it is proper, before a final decree disposing of the case is entered, to order an account to be taken of the moneys received by the joint committee also, in order that it may be determined how much the parties to the illegal agreement are entitled to by reason of its having been partially executed through the action of such committee. To enter a final decree without ordering such an accounting is erroneous.

In 1891 the directors of two corporations, the Greenville Compress etc. Co. and the Planters' Compress etc. Co., appointed a joint committee of their members to contrive a scheme for the consolidation of the companies. The plan approved by the committee was that a charter should be obtained for a new corporation to be known as the Greenville Cotton Press Association, and that the two corporations should be merged in this. The directors of each corporation indorsed this plan, and the action of the directors was afterwards ratified by meetings of the stockholders; but the meeting of the Greenville Compress etc. Co. was not held pursuant to a notice given as was required by law, and many of the stockholders were not represented. The directors of the corporations, supposing themselves to have been duly authorized by the stockholders to take action, met and passed a resolution, to the effect that the property and affairs of the corporations should be placed in the hands of a joint committee, and managed for the benefit of both bodies, until the consolidation had been carried out. The committee, finding that the work of the two compresses might be economically done by one, kept only that of the Greenville Compress etc. Co. in operation, and leased the other—the result being that the former received all the business which had previously gone to the latter. Early in November, 1891, the fact that the meeting of the stockholders of the Greenville Compress etc. Co. had been held without due notice having been in the mean time ascertained, a second meeting was called, and at this the stockholders voted against the consolidation. The directors of the corporation, accordingly, in view of this refusal to ratify their action and of the loss incurred by the Planters' Compress etc. Co., through the temporary cessation of its work, offered the latter company, as its share of the profits during the current

cotton season, two-fifths of the net earnings. This offer was refused, and the Greenville Compress etc. Co. then recommenced business on its own account, without any regard to the joint committee. On November 21st the Planters' Compress etc. Co. filed a bill to enjoin the other company from interfering with the committee in its management of the combined business until the end of the cotton season, or until the consolidation had been effected. An account of moneys received between the resumption of business by the Greenville Compress etc. Co. and the filing of the bill was also asked. The injunction asked having been granted, the committee again took possession of the property of the last-named company, and controlled it during the ensuing fall and winter. The injunction was afterwards decreed to continue till June, 1892, but was modified as to that portion by which it was attempted to compel a consolidation of the corporations. The defendant's answer which alleged that the agreement entered into by its directors was invalid, and that its stockholders were justified in refusing to ratify it, was afterwards turned into a cross-bill, in which it was asked that an account should be taken of the moneys which had been, or which should thereafter be, paid to the complainant, and that the sums found to have thus come into the hands of the latter should be paid to the defendant. The injunction was afterwards modified as to the portion which attempted to compel a consolidation of the two companies, but otherwise decreed to continue in force till June, 1892. In October, 1892, a final decree was made, denying the relief prayed for in the cross-bill, and declaring that the complainants were entitled to have the agreement enforced which had been made by the directors of the corporations regarding the management of their affairs by the joint committee during the cotton season ending June, 1892. It was also recited in the decree that since the complainant had already, through the action of that committee, obtained the relief sought, the bill was dismissed at defendant's costs. From this decree the defendant took an appeal. The charters of the two companies, which were produced in evidence, showed that they had no power to effect a consolidation.

Phelps and Larkin, and Skinner and Lowenthal, for the appellant.

Jayne and Watson, for the appellee.

COOPER, J. The agreement between the directors of their respective companies was clearly beyond the corporate powers of either company to make, and it had not been fully executed when the appellant withdrew from it. There are some decisions which proceed on the apparent postulate that an *ultra vires* agreement, executed fully by one of the corporations, or so far executed that the *status quo* cannot be restored, may be made the basis of an action. But in many of these cases it would be found that the measure of recovery would be the same, whether the injury done to the plaintiff by the failure of the defendant to perform, or the benefit received by the defendant under the agreement, is taken as the standard. Cases of this sort may therefore be well assigned to that other and far more numerous class, in which the right of recovery is not rested upon the invalid agreement, but is recognized to exist notwithstanding the agreement, upon the principle that the defendant may not repudiate the contract and yet retain the benefit which has been derived under it.

The decided weight of authority in England and America is that no action lies upon the invalid contract, that no decree can be made by a court of equity for its specific performance, nor a recovery had at law for its breach; but that, by proceeding in the proper court, the plaintiff may recover to the extent of the benefit received by the defendant from the execution of the agreement by the plaintiff: *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; 41 Am. Rep. 221; *Pearce v. Madison etc. R. R. Co.*, 21 How. 441; *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 658; 9 Ex. 224; *In re Cork etc. Ry. Co.*, L. R. 4 Ch. 748.

The chancellor, by the very extraordinary course pursued in this case, has not only specifically executed the *ultra vires* agreement, but has done it by a peremptory injunction, by taking the property of the appellant from its possession and turning it over to persons not parties to the suit, and who were not appointed receivers of the court. At the final hearing the court found itself in the anomalous position of not being in condition to afford relief by final decree, because, pending the suit, the complainant had worked out its own redress by receiving from the "joint committee" provided for by the agreement which it relies on its proportion of the proceeds of the enterprise. The court therefore dismissed the complainant's bill, but taxed the defendant with the costs.

It is to be regretted that an amicable settlement was not agreed on by the parties. The complainant should have promptly accepted the offer made by the defendant, to allow it two-fifths of the net proceeds of the season's work. In view of the condition in which the matter has been brought by the course pursued by the court below, it may be difficult to reach a complete settlement along strictly legal lines. The extent of the right of complainant is sufficiently indicated by what we have said. We will not now attempt to direct in what manner the account shall be taken, but will only reverse the decree, and remand the cause for further proceedings.

Reversed and remanded.

CORPORATIONS—CONSOLIDATION—LEGISLATIVE CONSENT NECESSARY.—A corporation has no power to enter into a contract of consolidation with another corporation without legislative authority: *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42; 72 Am. Dec. 685, and note. See extended note to *McMahan v. Morrison*, 79 Am. Dec. 422.

CORPORATIONS—ULTRA VIRES CONTRACTS.—A corporation which has discounted commercial paper without authority to do so can recover the money thus loaned: *Pratt v. Short*, 79 N. Y. 437; 35 Am. Rep. 531; *Germantown etc. Ins. Co. v. Dhein*, 43 Wis. 420; 28 Am. Rep. 549. If a corporation in excess of its powers receives money, which is to be returned if a certain additional amount is not received in a given time and the condition is broken an action will lie to recover the amount: *Morville v. American Tract Society*, 127 Mass. 129; 25 Am. Rep. 40. A corporation is liable on a *quantum meruit* on a contract *ultra vires*, but not immoral, broken by the other party: *Dial v. Spiral Springs etc. Co.*, 57 Mich. 146; 58 Am. Rep. 352. For a further discussion of the rights of parties to the *ultra vires* contracts of corporations, see the following cases: *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519; 24 Am. St. Rep. 931, and note; *Sherman Center Town Co. v. Morris*, 43 Kan. 282; 19 Am. St. Rep. 134, and note; note *Fidelity Ins. etc. Co. v. Western Pennsylvania etc. R. R. Co.*, 21 Am. St. Rep. 913.

LINDENMAYER v. GUNST.

[70 MISSISSIPPI, 698.]

ADVERSE POSSESSION BY NONRESIDENT, maintained by his tenant, will, if sufficiently long continued, create title by prescription.

EJECTMENT, RENTS RECOVERABLE IN.—A plaintiff in ejectment cannot, under the Mississippi Code, recover rents accruing more than six years before the commencement of the action.

ACTION of ejectment against the tenant of a nonresident, in which the statute of limitations was urged as a defense. On behalf of the plaintiffs it was contended that the case came under the exception of section 2678 of the Mississippi Code of 1880, which runs as follows: "If, after any cause of

action shall have accrued in this state, the person against whom it has accrued shall be absent from the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action after his return."

A. G. Shannon, for the appellants.

D. C. Bramlett, for the appellees.

CAMPBELL, C. J. The judgment is correct. Payne acquired title by adverse possession for ten years. Section 2678, code of 1880 (section 2748, code of 1892) has no application. It applies only where a cause of action accrues in this state, and the person against whom it has accrued goes from and resides out of the state. A non-resident may acquire title to land by adverse possession held for him by others. An action against the tenant would give the possession to the true owner, and prevent the ripening of the possession into title.

The successful plaintiff had no right to rent for more than six years.

Affirmed.

EJECTMENT—DAMAGES—RECOVERY OF RENT.—Damages in an action in ejectment may include the rents and profits accruing after the commencement of the action, down to the time when the assessment of damages is made: *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 366, and note. The computation of rent against a *bona fide* occupant should begin from the filing of the bill, but against a *mala fide* possessor, from his entry if within the period prescribed in the statute for the commencement of actions for the recovery of mesne profits: *Pugh v. Bell*, 2 T. B. Mon. 125; 15 Am. Dec. 142. See the note to *Cooke v. England*, 92 Am. Dec. 631.

ADVERSE POSSESSION BY TENANT OR AGENT FOR NONRESIDENT.—This question is discussed in *Omaha etc. Trust Co. v. Parker*, 33 Neb. 775; 29 Am. St. Rep. 506, and note.

ROSE v. LOUISVILLE, NEW ORLEANS, AND TEXAS RAILWAY COMPANY.

[70 MISSISSIPPI, 725.]

DAMAGES IN ACTIONS OF TORT, PRESUMPTION OF.—If an action sounds in tort, an instruction which directs the jury to find for the defendant, if the plaintiff "fails to prove that she has sustained either actual or possible damages," is erroneous. The law implies damages from every wrong.

RAILROAD COMPANIES, LIABILITY OF, FOR ACTS OF PEACE OFFICERS.—A railway corporation is liable for the acts of a peace officer in wrongfully ejecting a person from the waiting-room, if he acted under the direction of the corporation or its employees.

RAILROAD COMPANIES—LIABILITY FOR EXPELLING COLORED PASSENGER FROM WAITING-ROOM SET APART FOR WHITES.—In an action for damages brought against a railroad company by a colored woman, who alleged that she had been forcibly expelled from a waiting-room set apart for whites, and abused and beaten by the company's servants, an instruction to the jury to find for the defendant "if they believe from the evidence that a suitable waiting-room was provided by defendant for colored people, and that plaintiff entered and occupied that one set apart for white people," is erroneous, inasmuch as it makes no reference to the manner of plaintiff's ejection from the waiting-room. The right of ejection should be exercised in a proper manner, and whether it was so exercised is one of the questions put in issue by the plaintiff's allegations.

RAILROAD COMPANIES—DUTY TO PROVIDE WAITING-ROOMS FOR COLORED PASSENGERS.—Where a colored woman sues a railroad company for ejecting her from a waiting-room set apart for whites, and she seeks to establish her right to the use of such room by evidence that the waiting-room for colored people was in a separate building about one hundred and twenty-five yards from the usual stopping-place of the trains, and therefore so far away that she could not use it without the danger of missing her train, an instruction asked for by the plaintiff that the jury ought to find for the plaintiff if they believed from the testimony "that there was no suitable room for colored people in which plaintiff could wait for the train," should not be modified by the court so as to read "suitable or comfortable waiting-room," since, with the inserted words, it is subject to the criticism of ignoring the question of distance.

ACTION by Eliza Rose, a colored woman, to recover damages for a forcible ejection from a waiting-room set apart for white people at Leland, one of the stations on defendant's line. The plaintiff alleged that no suitable and convenient waiting-room for colored people had been provided at Leland; that she was obliged to change cars there and wait for another train; that, not seeing any waiting-room when she alighted, she applied to the conductor, who pointed out its position, about one hundred and twenty-five yards distant from the station itself, but told her at the same time that her train was due in two or three minutes, and that she would have no time to go to and return from the room before it arrived; that the train was late, and failed to arrive for a considerable time; that the plaintiff, as the night was cold and damp, and she had her infant with her, not finding any other suitable place, entered and used the waiting-room for whites, and was thereupon forcibly ejected therefrom by the servants of the defendant, or at their suggestion, and abused and beaten. The evidence given at the trial sustained the main allegation of the plaintiff, and it was also shown that she was ejected by the marshal of Leland, a peace officer, some testimony being also

introduced to prove that, in carrying out the expulsion, he was acting under the directions of the defendant's servants. The following are the instructions granted for the defendant, to which the court refers in its opinion: "1. The court instructs the jury that the plaintiff in this cause can only recover such damages as she has, by the evidence produced before them, shown that she has sustained; and that if plaintiff has failed to prove that she has sustained either actual or possible damages they will find for the defendant. "3. The court instructs the jury that the marshal of Leland was an officer of the law, and, as such, was authorized to remove plaintiff from the waiting-room provided and set apart at that place, by defendant, for white people, if they believe from the evidence that the defendant, in January, 1890, had provided and set apart separate and suitable rooms for the white and colored races at Leland, and that plaintiff was a colored woman; and that the defendant is not liable in damages because of the removal of plaintiff from the waiting-room set apart for white people by said officers, and her subsequent arrest. "4. The court instructs the jury that although they may believe from the evidence that the defendant failed to provide suitable and convenient waiting-rooms for passengers at Leland, the plaintiff cannot recover damages therefor beyond or more than they believe she has shown by the evidence that she has sustained; and that, if plaintiff has failed to prove that she has sustained damages, they will find for the defendant, unless they believe from the evidence she is entitled to punitive damages. "5. The court instructs the jury that, although they may believe from the evidence that the waiting-room at Leland provided and set apart by the defendant for colored people, was not as convenient as that provided for white people, yet, that they did not authorize plaintiff to enter and occupy the waiting-room set apart at that place by defendant for white people; and, if they believe from the evidence that a suitable waiting-room was provided by defendant for colored people, and that plaintiff entered and occupied that one set apart for white people, they will find for the defendant." One of the instructions given for the plaintiff was as follows, the words in italics being inserted by the court: "The court instructs the jury, at the request of the plaintiff, that if they believe from the evidence that the plaintiff was a passenger on defendant's train from Greenville, Mississippi, to Anguilla, Mississippi, and had paid the amount of

fare charged and demanded by defendant, and that she was carried by defendant to Leland, and that defendant's trains were so run that plaintiff had to change cars at Leland to go to Anguilla, and that defendant's south-bound trains on the main line did not so connect so as plaintiff could pass immediately from one train to another, without waiting for said south-bound train on the main line, and that plaintiff was compelled to wait at Leland for said train on the main line, and that defendant's train usually stopped at the hotel for passengers to get off and on said train, and that plaintiff was informed by the conductor of defendant that she did not have time to go up to the upper depot, and return, in time to get on said south-bound train on the main line, and that defendant did not have a suitable and comfortable waiting-room for colored passengers at or near enough to the place where the train on said main line stopped for passengers, and that there was no suitable or comfortable waiting-room for colored people in which plaintiff could wait for said train, and that by reason of such failure of defendant to furnish such waiting-room for plaintiff and other colored passengers, plaintiff was compelled to wait out in the weather with her child, they ought to find for plaintiff, and assess such damages as they believe, from all the circumstances and facts in evidence, she is entitled to, not to exceed twenty-five hundred dollars." The verdict was for the defendant, and plaintiff appealed from the denial of a motion for a new trial.

G. W. Thomas, for the appellant.

Mayes and Harris, for the appellee.

CAMPBELL, C. J. We would affirm this judgment but for erroneous instructions for the defendant. The first contains the erroneous proposition that it was necessary for the plaintiff to prove that she had sustained damages. Not so. The law implies damages for every wrong. The third instruction announces nonliability of the defendant, if the plaintiff was ejected from the waiting-room by an officer, without regard to the inquiry whether the officer acted under the direction of the servant of the defendant, and in what manner the removal was effected. The fourth is subject to the vice of the first. The fifth is objectionable, in that it directs a verdict for the defendant without reference to the manner of plaintiff's ejection from the waiting-room for whites. The right to eject

should be exercised in a proper way, and that this was not done was one of the matters in dispute.

The second modification by the court of the first instruction for the plaintiff by the words "or comfortable waiting," as applied to the waiting-room for colored people, is subject to the criticism that it ignores distance, and had better be avoided on another trial.

Reversed and remanded. _____

CIVIL RIGHTS OF COLORED PERSON ON RAILWAY TRAINS.—A railway company is liable for excluding, on account of her color, a colored woman from a car set apart for ladies, and gentlemen accompanied by ladies: *Chicago etc. Ry. Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641. The section of the penal code of New York providing that "no person can, by reason of race, color, or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility, or privilege furnished by innkeepers or common carriers," etc., is constitutional: *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 389, and note. In Michigan there is an absolute unconditional equality of white and colored persons in all public places, and a discrimination against a colored person on account of his color is a ground for the recovery of damages: *Ferguson v. Gies*, 82 Mich. 358; 21 Am. St. Rep. 576, and note.

CIVIL RIGHTS.—DUTY OF RAILROADS TO FURNISH EQUAL ACCOMMODATIONS to white and colored persons is discussed in *Louisville etc. Ry. Co. v. State*, 66 Miss. 662; 14 Am. St. Rep. 599, and the note thereto.

RAILROADS—LIABILITY FOR TICKET AGENT CAUSING ARREST OF PASSENGER: See *Palmer v. Manhattan Ry. Co.*, 183 N. Y. 261; 28 Am. St. Rep. 632, and note; and *Mulligan v. New York etc. Ry. Co.*, 129 N. Y. 506; 28 Am. St. Rep. 539, and note.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**ARMOUR BROTHERS BANKING COMPANY v. St.
LOUIS NATIONAL BANK.**

[113 MISSOURI, 12.]

ATTACHMENT.—CORPORATE STOCK CANNOT BE ATTACHED OR SUBJECTED TO A GARNISHEE PROCESS unless the authority for that purpose is expressly conferred by statute.

ATTACHMENT OF STOCK OF A FOREIGN CORPORATION is not possible in Missouri, because as to such corporation there can be no compliance with the statutes of the state requiring the sheriff to leave with the secretary of the corporation a copy of the writ, and also of his return of the execution, after such shares have been sold.

ATTACHMENT—CORPORATIONS.—STOCK CERTIFICATES ARE ONLY THE EVIDENCE OF OWNERSHIP OF STOCK, not the stock itself. Therefore shares of stock in a foreign corporation cannot be attached by levying an attachment on the certificates of such stock in the state where suit is brought.

Horatio D. Wood, for the appellant.

Fiske and Allen, and P. Taylor Bryan, for the respondent Cairns.

THOMAS, J. On the 23d of October, 1887, the plaintiff company commenced an action of attachment against Charles R. Smith, a nonresident of this state, upon two promissory notes, amounting to over forty-one thousand dollars. A writ of attachment was issued, and on the same day the sheriff summoned the St. Louis National Bank, as garnishee, which, in its answer to interrogations, stated that it had in its custody three certificates of stock, numbers 151, 152, and 153, issued to Charles R. Smith by the Colorado, Chicago, and Texas Land, Cattle, and Improvement Com-

pany, a corporation organized under the laws of Texas, the certificates being for five hundred shares of stock in the aggregate of the par value of one hundred dollars each; that these certificates had been deposited with the garnishee as collateral security for a note signed by Smith, payable to J. J. Fisher, for seven thousand dollars, and by the latter indorsed to the bank; that on December 2, 1889, L. G. Cairns, by his agent, paid said note of seven thousand dollars, but at the same time notified said bank that the amount of the note was tendered and paid by Cairns as the owner of the shares of said stock, and not for the benefit or for account of said Smith; and the garnishee prayed that Cairns be permitted to interplead in the cause, and asked leave of the court to deposit the said certificates of stock with the clerk, to be held and disposed of in pursuance of the order of the court. The certificate was thus deposited, the garnishee discharged, and an order made on Cairns to appear and sustain his claim. Smith made default, but Cairns appeared and filed a plea to the jurisdiction of the court, as also a motion to quash the return of the sheriff on the writ of attachment, on the ground, among others, that the said certificates of stock were not subject to the process of garnishment. The plea and motion were both sustained, the garnishment proceeding dismissed, and plaintiff has appealed.

1. It is a well-settled principle of law that stock in a corporation cannot be attached or subjected to a garnishee process unless authorized by express statute: *Drake on Attachments*, sec. 244; *Foster v. Potter*, 37 Mo. 525; *Plimpton v. Bigelow*, 93 N. Y. 592. And the question presented by this record for decision involves the construction of the several sections of our statute on the subject of the seizure and sale of shares of stock in a corporation under execution and attachment. Section 540, Revised Statutes of 1889, provides that "shares of stock in any bank, association, joint stock company or corporation belonging to any defendant in any writ of attachment may be attached in the same manner as the same may be levied upon other execution."

Turning to the statutes in regard to executions we find that sections 4915, 4924, 4925, and 4953 in substance provide that shares of stock in corporations may be sold under execution; that when an execution is issued against a person owning shares of stock in any corporation it shall be the duty of the secretary or other officer to furnish to the sheriff a certifi-

cate of the number of shares held by the defendant, with the encumbrance thereon; that the levy shall be made by leaving a copy of the writ with the secretary or other officer, with a certificate attested by the officer; that he levies upon and takes such shares to satisfy the execution; and that when such shares are sold the officer shall execute and deliver to the purchaser a bill of sale conveying the same, and leave with the secretary of the corporation a copy of the execution and his return thereon, and the purchaser shall thereupon be entitled to all dividends and stock and to the same privileges as a member of such corporation as the debtor was entitled to.

In regard to these provisions we remark in the first place that, in our judgment, they apply to domestic corporations alone. It is true they are general enough to embrace corporations of other states and countries, but their details, prescribing the manner of seizing and conveying the shares of stock, point unerringly not only to corporations organized under the laws of this state, but also to corporations alone whose place of business is within the county and jurisdiction of the officer making the levy and sale. Beyond question that provision requiring the secretary of the corporation to furnish the sheriff with a certificate stating the number of shares held by defendant in the execution applies to domestic corporations alone, for it can, in the nature of things, have no vigor or force beyond the territorial limits of Missouri. And this is the construction given a statute, couched in somewhat similar language, by the court of appeals of New York in *Plimpton v. Bigelow*, 93 N. Y. 592, where it is said that such a statute "has an appropriate application to shares of domestic corporations. Such corporations are completely subject to the jurisdiction of our courts, and may be compelled to recognize a title to corporate shares derived under proceedings by attachment. In respect to foreign corporations such power does not exist, and it could scarcely be expected that the courts of another state would recognize a title to corporate stock of its own corporations founded upon a sale under an attachment issued by courts against a nonresident when the only semblance of jurisdiction over the property was the service of notice in the attachment proceeding upon an officer or agent of the corporation here. . . . The abstract entity—the corporation—is the owner, and only owner, of the property. . . . We do not doubt that shares for the purpose

of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation, by intendment of law, always remains, to wit, in the state or country of its creation. In all other places it is an alien. It may send its agents abroad as any other inhabitant may do, without passing personally into the foreign jurisdiction, or changing its legal residence." And it was accordingly held that the statute applied to domestic corporations alone.

In the second place we say the court acquired no jurisdiction of the *res* in this case, because the levy of the attachment upon the shares of stock wholly failed to come up to the requirement of the statute. The sheriff did not—could not—comply with that provision requiring him to leave a copy of the writ with the secretary of the corporation. The entity—the corporation—was beyond his bailiwick, and beyond the confines of the state. Nor could the sheriff, for the same reason, make a valid transfer of this stock upon any sale he might make, the statute requiring him not only to deliver to the purchaser a bill of sale, but also to leave with the secretary of the corporation a copy of the execution and his return thereon. The simple seizure and sale of the paper certificate is not enough. Notice to the corporation is essential under our statute to make a valid levy and sale.

2. But it is earnestly insisted that the certificates of the stock were choses in action, and as such were specifically subject to garnishment process under the writ of attachment. There has been much discussion as to the nature of the property of a shareholder in the stock of a corporation. "The right," says the court of appeals of New York in *Plimpton v. Bigelow*, 98 N. Y. 592, "which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate, according to the amount of his stock, in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after the payment of its debts.

Chief Justice Shaw, by way of a definition of a share of stock, says: "The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers; to share in the dividends of profits, and to receive an aliquot part of the capital on winding up and terminating the active existence and operations of the corporation": *Fisher v. Essex Bank*, 5 Gray, 373. Mr. Justice Sharswood, in *Neiler v. Kel-*

Ley, 69 Pa. St. 403, says: "A share of stock is an incorporeal, intangible thing." Judge Holmes, in *Foster v. Potter*, 37 Mo. 525, says: "The property interest of the shareholder is an intangible and invisible thing, and cannot be actually seized by the officer." And again, in the same case, he says: "Such property is neither a specific chattel nor a debt, but a mere chose in action." But be that right what it may, certificates of stock are not the stock itself—they are but evidence of the stock; and the stock itself cannot be attached by a levy of attachment on the certificate. As was well said by the supreme court of Pennsylvania: "Stock cannot be attached by attaching the certificate any more than lands situate in another state can be attached by an attachment in Pennsylvania served on the title deeds to such land": Cook on Corporations, sec. 485. "Shares of stock in a corporation are personal property, whose location is in that state where the corporation is created. . . . Considered as property separated from its owner, stock is in existence only in the state of the corporation": Cook on Corporations, sec. 485.

In *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, the supreme court of Tennessee said: "If the presence within the state of the stock certificates was essential in determining the *situs* of the stock, then it is admitted that the certificates were, both in contemplation of law as well as in fact, with the person of Powell, who was a nonresident. But these stock certificates were the mere evidences of the ownership of the shares—*indicia* of his interest in the earnings and profits of the company. Their seizure by an execution or by an attachment would not be a seizure or levy upon the stock itself without more. Notice to the corporation, or to the officer having charge of the books of the company, is essential in case of execution. . . . Hence the locality of the paper certificates, or their actual seizure, is unimportant."

In *Foster v. Potter*, 37 Mo. 525, this court held that without an express statute, shares of stock, even of domestic corporations, could not be seized as personal property or evidences of debt; and if this cannot be done, it is too plain for argument that the shares of stock in a foreign corporation cannot be levied on by simply seizing a certificate which may happen to be in this state.

It is not necessary in this case to define the limits of legislative power to authorize the seizure and sale, under judicial process for the payment of debts, of certificates of stock of

foreign corporations found in this state. It is sufficient for our present purpose to say that the legislature has not yet seen proper to go that far. Our statute in regard to the sale of shares of stock under attachment and execution applies, as we have seen, to domestic corporations only, and it points out a specific mode by which the levy and sale must be made, which in this case was not and could not be pursued.

The judgment will be affirmed.

All concur.

ATTACHMENT OF CORPORATE STOCK.—This question is discussed in *Keating v. J. Stone etc. Live Stock Co.*, 83 Tex. 467; 29 Am. St. Rep. 670, and note, in which all the cases in this series discussing this subject are collected. See also the notes to *Colt v. Ives*, 81 Am. Dec. 169, as to whether stock is liable to attachment against the vendor, and *Combs v. Jordan*, 22 Am. Dec. 236, as to whether corporate stock is subject to execution.

STATE v. AUGUSTINE.

[113 MISSOURI, 21.]

PUBLIC OFFICERS, POWER TO ACCEPT RESIGNATION OF.—In the absence of express statutory enactment, the power to accept the resignation of a public officer is vested in the authority which has the power to appoint a successor to fill the vacancy.

PUBLIC OFFICERS—REQUISITES OF A VALID RESIGNATION.—A resignation of a public office need not be in any particular form. It is sufficient that the incumbent evince, by parol or in writing, a purpose to relinquish the office; that this purpose be communicated to the proper authority, and that the resignation be accepted, either in terms or by something tantamount to an acceptance, such as the appointment of a successor.

PUBLIC OFFICERS—RECALLING RESIGNATION.—When a resignation of a public officer has been communicated to the proper authority, and by him accepted, whether formally or by the appointment of a successor, it is beyond recall, and cannot afterwards be withdrawn. Nor is this result changed by the fact that a formal commission was not issued to the new incumbent until some days after the governor was notified that the former incumbent wished to withdraw his resignation.

William Heren, P. Mercer, and T. H. Ensor, for the appellant.

H. S. Kelley, David Rea, J. A. Sanders, and Booher and Williams, for the respondent.

MACFARLANE, J. This is a proceeding by *quo warranto* to test the title of defendant to the office of treasurer of Andrew county. It was commenced in the circuit court of Andrew county, but was removed by change of venue to Buchanan county, where a judgment of ouster was rendered against

defendant, who appealed. From the evidence the following conclusion of facts are fairly deducible.

On the twenty-fifth day of June, 1889, defendant, John Augustine, being then treasurer of said county, tendered to the county court of said county his written resignation, intending to resign, vacate, and surrender said office. The county court thereupon made an order of record accepting the resignation, and, in the presence and by consent of defendant, directed the county clerk to certify the resignation to the governor of the state, in order that the vacancy might be filled, which was done. These certificates were received by the governor, and afterwards, on the 28th of June, he appointed relator, Nicholas Kirtley, treasurer of said county as successor of defendant, and directed the secretary of state to issue a commission. Owing to necessary formalities, the commission was not issued until July 5th next thereafter, but Kirtley had notice of his appointment not later than the thirtieth day of June. On the first day of July defendant lodged with the county court a writing by which he undertook to withdraw his resignation, and on the same day he telegraphed his withdrawal to the governor.

This appeal seems to have been taken in the first instance to the Kansas City court of appeals, and from there transferred to this court, for the reason that the proceeding involved the title to an office under the state, which gave exclusive jurisdiction to the supreme court. We find with the papers on file an opinion written by Judge Gill of said court of appeals, which we think clearly expresses the law in the case, and which we adopt as the opinion of this court. It is as follows:

“It is well-established law, that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment: 1 Dillon on Municipal Corporations 8d ed., sec. 224; Mechem on Public Offices, sec. 413; *Van Orsdall v. Hazard*, 3 Hill, 243; *State v. Boecker*, 56 Mo. 17.

“By section 11, article 5, Constitution of Missouri, it is provided that: ‘when any office shall become vacant, the governor, unless otherwise provided by law, shall appoint a person to fill such vacancy,’ etc. It seems that no provision exists in our statutes for filling the vacancy of county treas-

urer. Hence it follows that the power of appointment remains, as directed by the constitution, with the governor. And the authority to fill the vacancy being with the governor, here likewise rests the power to accept the resignation. In order then to create a vacancy in the office held by Augustine his resignation must have been lodged with the governor, and by the governor accepted. There being no particular mode pointed out by statute or by the constitution, this resignation may be in writing or by parol. No particular form is required. It is only necessary that the incumbent evince a purpose to relinquish the office—that this purpose be communicated to the proper authority, and that this resignation be accepted either in terms or something tantamount thereto, such as appointing a successor, etc.: *Edwards v. United States*, 103 U. S. 471–474; *People v. Board of Police*, 26 Barb. 502; *Mechem on Public Offices and Officers*, section 414 et seq.

“When this resignation shall have been communicated to the proper authority and the same shall be accepted—whether formally or by the appointment of a successor—it is beyond recall, it cannot then be withdrawn: *Mimmack v. United States*, 97 U. S. 426.

“In view then of these principles it would seem that defendant Augustine had accomplished a complete resignation of the office to which he was elected. It is clear that he and the members of the county court assumed the law to require his resignation to be presented to the county court.

“In this they were clearly mistaken, since, as already shown, the governor of the state, the appointing power, was the proper party to whom the resignation should have been tendered. However defendant’s resignation was, by his knowledge and consent, forwarded to the governor, and he acted thereon by designating a successor, and this too before defendant made any effort to withdraw such resignation. This conduct on the part of Augustine signified a complete renunciation of the office—a resignation—and there was by the governor such an acceptance as constituted a vacancy. The naming a successor (though a formal commission had not been made out) committed the governor to, and at law constituted an acceptance of, Augustine’s resignation: *Mimmack v. United States*, 97 U. S. 426; *Mechem’s Public Offices and Officers*, sec. 415.

“The case at bar is one quite different from *State v. Boecker*,

56 Mo., 17, so confidently relied upon by defendant's counsel. There Boecker, on August 9, 1872, tendered his resignation as county clerk, to take effect December 31st following, by filing the same with the county court. On September 9th Boecker told Van Buskirk that he intended to withdraw his resignation. On September 14th Van Buskirk presented to the governor a certified copy of Boecker's resignation with copy of the order of county court accepting same, and secured his (Van Buskirk's) appointment. This was done, however, against the consent, express wishes, and protest of Boecker, quite the reverse of the case here. It was there held, as we have decided, that a deposit of the resignation with the county court was a mere nullity; and that to constitute a resignation it should have been, with the knowledge and consent of Boecker, lodged with the governor and by him accepted. The evidence in the case at bar satisfactorily establishes the fact that Augustine consented and agreed that his resignation should be forwarded to the governor, and this was done, and the governor acted thereon before defendant attempted to withdraw the same."

Judgment of the circuit court affirmed.

All concur.

OFFICERS—FORM OF RESIGNATION.—An office may be resigned by parol: *State v. Allen*, 21 Ind. 516; 83 Am. Dec. 367, and note.

OFFICERS—RESIGNATION—POWER TO RECALL.—A resignation sent to the governor to take effect immediately cannot be withdrawn even with the consent of the governor: *State v. Hauss*, 43 Ind. 105; 13 Am. Rep. 384. Until a resignation has been accepted it is inoperative, and the officer remains in office: *Coleman v. Sands*, 87 Va. 689; *State v. Clayton*, 27 Kan. 442; 41 Am. Rep. 418, and note.

MURPHY v. CARLIN.

[118 MISSOURI, 112.]

WILLS—INTENT OF TESTATOR GOVERNS.—A court can best ascertain the true intent and meaning of a testator by putting itself, as far as may be in his place, and reading all the directions of his will in the light of his environment at the time it was made. When that intent and meaning can be in this way clearly ascertained, all technical rules and adjudicated cases in other jurisdictions standing in the way of its execution must be disregarded.

WILLS—PRECATORY TRUSTS.—No particular form of expression is requisite to create a precatory trust. Words of recommendation, request, entreaty, wish or expectation will impose a binding duty on a devisee or

legatees by way of trust, provided the testator has pointed out, with sufficient clearness and certainty, the subject matter and the object of the trust; nor will the fact that the testator's whole estate is disposed of in absolute terms, before the precatory words occur in the instrument, prevent the trust from attaching.

WILLS—PRECATORY TRUSTS, WHEN DEEMED TO EXIST.—In determining whether a precatory trust is raised by a will, the essential point is, whether, looking at the whole contents of the instrument, it should be inferred that the testator intended to impose an obligation on his devisees or legatees to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to them to carry out such wishes or not at their discretion.

WILLS, CONSTRUCTION OF—PRECATORY TRUSTS—EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.—A precatory trust is created by the following clause in a will: "It is my wish and desire that my wife continue to provide for the care, comfort, and education of T. J. M., now aged nearly five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case of her death, providing that he continue to be a dutiful child to her and shows himself worthy of such consideration."

Rowell and Ferriss, Rassieur and Schnurnacher, and J. H. Zumbalen, for the appellants.

R. A. Bakewell and J. L. Hornsby, for the respondent.

BRACE, J. This is an action in the nature of a bill in equity to enforce a precatory trust alleged to arise under the will of John Whelan, who died January 9, 1882. The will is dated May 13, 1880, and provides as follows:

"*First.* For payment of debts and funeral expenses.

"*Second.* Legacy of \$1,500 to the testator's sister, Mary Conners.

"*Third.* Legacy of \$1,000 to Mollie Curran, the child of the testator's niece, Ann Conners.

"*Fourth.* Legacy of \$1,000 to John Cullinane in recognition of many years of faithful service.

"*Fifth.* I give, bequeath and devise all the rest of my property, both real and personal, and of every kind, nature and description, unto my dearly beloved wife, Margaret, and to her heirs and assigns forever, to have and to hold the said property with all privileges and appurtenances thereto belonging unto my said wife, Margaret, and to her heirs and assigns forever.

"*Sixth.* It is my wish and desire that my wife continue to provide for the care, comfort and education of Thomas Joseph Murphy, now aged nearly five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case of her death, provid-

ing that he continue to be a dutiful child to her and shows himself worthy of such consideration."

After the death of Whelan, his widow, the said Margaret, intermarried with William P. Smythe, and afterwards died intestate, seised of certain real estate situate in the city of St. Louis and described in the petition, purchased by her during her widowhood, with the proceeds of property acquired by her by said will. The defendants are the heirs at law of the said Margaret.

The circuit court found for the plaintiff, awarding him the gross sum of ten thousand dollars, and charged the same as a lien upon said real estate, and defendants appealed.

The testator by his will appointed his wife sole executrix thereof without bond. At the time he executed the will, and at the time of his death, he was possessed of a large estate, and was living in a style befitting that estate, which was the fruit of his own economy and industry. His widow, after paying all the specific legacies contained in the will, funeral expenses and other liabilities, received of the personal estate as sole legatee under the will, as appears from her last settlement made April 15, 1884, the sum of eighty-six thousand six hundred and thirty dollars and thirty-nine cents in cash or its equivalent. The testator and his wife had no children. The plaintiff, who is a minor, suing by his next friend (at the time of the trial of the age of fifteen years) was taken by Mrs. Whelan when he was eighteen months old to be reared as her own child. He was then an orphan, the son of respectable parents, and under the control of his mother's relations, his father and mother both having died but a short time before. He was never formally adopted by the testator, but was taken into his family, given his surname, and ever afterwards treated as a favorite son by him and his wife until they died, and never found out that he was not their son until after Mrs. Whelan's death. He was about seven years old when Mr. Whelan died, and about ten when Mrs. Whelan died, was a dutiful child and fully reciprocated the affection of his supposed parents.

1. The cardinal rule prescribed by the legislature of this state for "all courts and others concerned in the execution of last wills" is to "have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them": Revised Statutes, 1889, sec. 8916.

The true intent and meaning of the testator can be best

ascertained by the courts and those concerned in the execution of wills by putting themselves, so far as may be, in the place of the testator and reading all his directions therein contained in the light of his environment at the time it was made: *Hall v. Stephens*, 65 Mo. 670; 27 Am. Rep. 302; *Noe v. Kern*, 93 Mo. 373; 3 Am. St. Rep. 544; *Suydam v. Thayer*, 94 Mo. 49; *Munro v. Collins*, 95 Mo. 33; *Small v. Field*, 102 Mo. 104; *Long v. Timms*, 107 Mo. 512. When that intent and meaning can be thus clearly ascertained, then all technical rules and adjudicated cases in other jurisdictions that would stand in the way of its execution must be disregarded.

In *Schmucker's Estate v. Reel*, 61 Mo. 592, the prevailing doctrine in regard to precatory trusts was recognized to be "that no particular form of expression is requisite in order to create a binding and valid trust; and that words of recommendation, request, entreaty, wish, or expectation will impose a binding duty upon the devisee by way of trust, provided the testator has pointed out with sufficient clearness and certainty both the subject matter and the object of the trust." This rule was again recognized by this court in *Noe v. Kern*, 93 Mo. 373, 3 Am. St. Rep. 544, in which it was said: "In this class of cases the difficulty is not as to what the rule is, but as to its application." "Every case must depend upon the construction of the particular will under consideration. The point really to be determined . . . is, whether looking at the whole context of the will the testator intended to impose an obligation on his legatee to carry his wishes into effect, or whether having expressed his wishes, he intended to leave it to the legatee to act on them or not at his discretion": 1 Perry on Trusts, 3d ed., sec. 114. Bigelow, C. J., in *Warner v. Bates*, 98 Mass. 276, says in regard to this rule: "The criticisms which have been sometimes applied to this rule by text-writers and in judicial opinions will be found to rest mainly on its application in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent."

As thus explained this rule was applied by this court in the case of *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 544. In that

case a childless married couple had taken two children to raise. The wife was possessed of an estate, and died before her husband. The children were the offspring of the wife's deceased brother; they were both frail, in bad health, and without any means of support. They had been taken into the family and treated as the children of the testatrix and her husband, though never legally adopted. The wife by her will devised and bequeathed all her estate to her husband absolutely, and added, "I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother Simeon, whom we have undertaken to raise and educate," and appointed her husband executor of her will. He died two days after the death of his wife without having made any provision in his will for the children. And we held that the property devised to the husband was charged by the will with a trust for the benefit of the children.

That case is strikingly analogous to the one in hand, and most of the objections urged against a similar holding here are answered in the opinion in that case. As in that, so in this, case, both the subject matter and object of the trust are pointed out with sufficient clearness and certainty. The precatory words in this case are a positive and unequivocal expression of the wish and desire of the testator; and the fact that the whole estate is bequeathed absolutely and immediately before the precatory words are used, ought not in this, as they did not in that, case prevent the trust from attaching—provided such was the intention of the testator: *Knight v. Knight*, 3 Beav. 172; *Bohon v. Barrett*, 79 Ky. 378; *Warner v. Bates*, 98 Mass. 274; *Erickson v. Willard*, 1 N. H. 217; *Knox v. Knox*, 59 Wis. 172; 48 Am. Rep. 487; *Colton v. Colton*, 127 U. S. 300; Hill on Trustees, 71; 1 Jarman on Wills, 680.

So that we recur to the main proposition, as stated by Mr. Perry: Did the testator, in this will, having expressed his wishes, intend to impose an obligation upon his legatee to carry them out; or to leave her to act on them or not at her discretion? In considering this question it is to be remembered that the devisee is the wife of the testator, between whom it is not expected that commands would be expressed in such forcible language as between strangers: *Warner v. Bates*, 98 Mass. 274; *Knox v. Knox*, 59 Wis. 172; 48 Am. Rep. 487. That not only as wife and legatee receiving the great bulk of his estate was her conscience charged with the duty out of the abundance of the estate given her to make provi-

sion for this child; but that, as executrix, she was charged by him and by the law with the duty of carrying out "his directions," according to the true intent and meaning of the testator. That it was his intention that she should be imperatively charged with that duty is apparent from the circumstances surrounding the transaction, as well as upon the face of the will. Here was a helpless infant, an affectionate boy, reared in his family without means and without friends to assist him in the battle of life, taught to regard the testator as his father and to look to him for protection, and for whom he seems to have had a father's affection; a woman young enough to contract future marital relations that might seriously interfere with the protection which he knew she was then disposed to give him. Is it not more reasonable that he should have intended to make the provision for him obligatory upon his wife rather than to leave his fate to the whim and caprice of herself or some future husband? If this boy had been the testator's natural born son, who would have a doubt of it? And yet he seems to have entertained the same sort of affection for this boy "who had been raised as a member of his family since his infancy." Why then make a distinction in interpreting his will? That his wife was to be charged with the obligation "to continue to provide for the care, comfort, and education" of the child, and, "in case of her death, make a suitable provision for him," seems manifest from the fact that he placed in the will itself the condition upon which she was to be released from that obligation, i. e., "Should he show himself unworthy of such consideration." There was no necessity for this provision, if his wife was to have unlimited discretion to provide for the plaintiff or not, as she might choose. He named the condition and (*expressio unius exclusio alterius*), the only condition upon which her failure to execute his wishes in that behalf should be excused. Hence, the condition being performed, the duty became imperative.

In the will and the circumstances of this case is found an apt illustration of the testator's idea of the difference between an unlimited discretion and the obligatory character of this provision thereof. Before this boy had been taken into the testator's family, another child had been so taken by him and his wife. She was some years older than the plaintiff, and a relative of the testator, and he seems to have been sincerely attached to her also. To this child, Mollie Curran, he made

a specific bequest of one thousand dollars, and about her said nothing more, but left her future comfort and education to be provided for or not, as his wife might choose. The provision for the plaintiff is in striking contrast with his action in respect to her, and he certainly did not intend to leave him in a like condition dependent entirely upon the good-will of his wife, or he would doubtless have treated him in his will in like manner.

That the force of her obligation to provide for the plaintiff was recognized by Mrs. Whelan is evidenced by the fact that during her life she continued to provide for his care, comfort, and education, and frequently told her second husband that she intended to leave him the very property sought to be charged in this case. That it was the duty of Mrs. Whelan to make a suitable provision for the plaintiff out of the estate which her husband bequeathed her, we think is evident from what has been said, and, she having died without having done so, a court of equity ought to make that provision for him.

In view of the amount of the estate bequeathed, the mode of life to which the testator and his wife had accustomed this plaintiff, and the reasonable expectations that would be engendered by the treatment which he received from his supposed parents during their lives, the amount allowed by the circuit court was entirely reasonable, and its decree will be affirmed.

All concur except BARCLAY, J., not sitting.

WILLS.—INTENT OF TESTATOR GOVERNS in the construction of a will, and will be given effect when not against public policy or in contravention of law: *Dickison v. Dickison*, 138 Ill. 541; 32 Am. St. Rep. 163, and note; *Greene v. Greene*, 125 N. Y. 506; 21 Am. St. Rep. 743, and note; *Morrison v. Sessions*, 70 Mich. 297; 14 Am. St. Rep. 500, and note.

WILLS.—INTENT OF TESTATOR—FROM WHAT GATHERED.—The intent of the testator must be gathered from a consideration of the contents of the entire will: *L'Etourneau v. Henquenet*, 89 Mich. 428; 28 Am. St. Rep. 310; *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487, and note; *Goebel v. Wolf*, 113 N. Y. 405; 10 Am. St. Rep. 464, and note.

PRECATORY TRUSTS—NO FORM OF WORDS NECESSARY TO CREATE.—No certain form of words is necessary in creating a trust, but the intention must be complete and plainly manifest: *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641, and note. The intent of the testator to create a trust must be apparent from the face of the will, as a trust will not be created by the mere use of words of trust or confidence: *Boyle v. Boyle*, 152 Pa. St. 108; 34 Am. St. Rep. 629, and note with cases collected; *Seamonds v. Hodge*, 36 W. Va. 304; 32 Am. St. Rep. 854, and note; *Good v. Fichthorn*, 144 Pa. St. 287; 27 Am. St. Rep. 630; *Randall v. Randall*, 135 Ill. 398; 25 Am. St. Rep. 373, and note.

GAUS AND SONS MFG. CO. v. ST. LOUIS, KEOKUK,
AND NORTHWESTERN R. R. CO.

[112 MISSOURI, 303.]

HIGHWAYS—RIGHTS OF ABUTTING OWNERS.—Every owner of a lot abutting on a public street has an easement for the free admission of light and air, and for ingress and egress to and from the property.

EMINENT DOMAIN.—A CITY LOT IS DEEMED TO BE "DAMAGED," within the meaning of a constitutional provision which forbids the "taking or damaging of private property for public use without compensation," whenever there is a public use of the adjacent street which diminishes the value of the lot by interfering with the enjoyment of those private rights in the nature of incorporeal hereditaments which the law attaches to such property, as a consequence of its abutting on the street.

HIGHWAYS, FOR WHAT PURPOSES MAY BE USED—NEW SERVITUDE.—A public street may be applied to all purposes which are not subversive of its proper use, nor inconsistent with the uses contemplated in its dedication, grant, or condemnation. An abutting owner can complain only when the street is subjected to a new servitude, inconsistent with and subversive of its use as a street.

HIGHWAYS, CONSTRUCTION OF RAILROADS ON, NOT A NEW SERVITUDE.—Laying a track on the established grade of a street, under proper legislative authority, and operating a steam railroad thereon in the transaction of commercial business, is not a perversion of the street from its original purposes.

HIGHWAYS, DAMAGES FOR OPERATION OF RAILROAD ON.—Damage to the abutting property from the operation of a steam railroad on a public street is *damnum absque injuria*, when the only substantial injuries special to the plaintiff consist in the interference with his free access to his property, the obstruction of the light and air across the open street, the smoke, cinders, and dust from the engine and cars, and the noise and jarring of the ground, caused by the movement of the trains.

HIGHWAYS.—NEGLIGENT MAINTENANCE OF A RAILROAD TRACK, or negligent operation of trains upon a street, renders the railroad company liable for resulting damages.

Mills and Flitcraft, for the appellant.

John G. Chandler, for the respondent.

MACFARLANE, J. This suit is to enjoin defendant from laying a track and operating a railroad laterally along Main street in the city of St. Louis in front of the property of plaintiff until compensation for damages thereto should be ascertained and paid. Upon a trial in the circuit court plaintiff's petition was dismissed, and they appealed. A preliminary injunction which was granted at the beginning of the suit was dissolved, and the road had been built and was in use when the case was tried.

The petition charged, and the evidence showed, that Main

street is and for many years has been an improved, graded, guttered, curbed, and paved public highway, running north and south through the city of St. Louis; that plaintiffs own the entire block fronting on Main street between Clinton and Madison streets, and have thereon a two story and basement factory, having a front of two hundred and forty feet by a depth eastwardly of one hundred and thirty feet, which was erected for the special purpose of and was adapted by its construction to use as a planing-mill, sash, door, blind, and box factory, and was used as such; that the building fronts on Main street, and is so constructed that the only front which is adapted for receiving and shipping lumber from the street is the Main street front; that the building is constructed with doors and driveways opening on Main street for the purpose of receiving lumber and shipping out the product of its said factory; that Main street has a width of eighty feet; that the Merchants' Terminal Railroad Company has also a double track railroad along said street, the easternmost rail being within fifteen and one-half feet of the curb in front of the factory; that plaintiffs and their customers had theretofore had free access to said factory by driving wagons and other vehicles over Main street to its front, and for the purpose of carrying thither or removing therefrom lumber or mill work, have been able to enter said premises from Main street front by means of doors and entrances provided, and have been able to have wagons and vehicles stand on the street in front of the factory for the purpose of receiving and discharging lumber and mill work; that there is in front of said premises a sidewalk made of plank and cinders fifteen feet wide from the building line to the curb of the street; that the defendant threatened and was about to occupy and obstruct said street by laying thereon in front of said factory, and operating by steam locomotives thereon, double tracks, thereby permanently obstructing said street and not leaving space between the track and the building sufficient to permit of standing wagons and other vehicles, without constant danger of collision with engines and cars passing to and fro over said tracks, all of which would wholly destroy the use of the street as a thoroughfare, and tend to manifest wrong and injury of plaintiff and damage of his said property. The damage to the property as charged consisted in the prevention of free ingress and egress to and from the streets, noise and smoke, damage from fires, shaking and vibration of building, all

caused by the passage of engines and cars over the street in such proximity to the premises.

Defendant answered, setting up authority by virtue of an ordinance of the city granting it the license and right to construct a double track railroad along Main street. The ordinance required that the tracks should conform to established grades of the street crossed and occupied. The ordinance and its provisions were not denied. The evidence satisfies us that the tracks were built in a careful and skillful manner and in compliance with the requirements of the ordinance.

1. We are satisfied, from an examination of the evidence, that plaintiff's property has been somewhat depreciated in value by reason of the construction of the railroad along the street and the movements of engines and trains thereon. The inquiry to be made is whether the damages thus inflicted are such as are contemplated by section 21, article 2, of the state constitution, which ordains: "That private property shall not be taken or damaged for public use without just compensation."

It is not claimed by plaintiff that there was any physical injury done to their property, or that their possession was disturbed. It was also shown to our satisfaction, or conceded under the pleadings, that Main street was dedicated without restrictions to general use as a highway; that defendant was authorized by the charter and ordinances of the city to lay its tracks along said street, and to move thereon cars, propelled by steam locomotives, for the transportation of persons and property; and that the track was laid on the established grade of the street, and was constructed in a careful and skillful manner, and in strict compliance with the requirements of the ordinance.

On the other hand, it must be conceded by defendant, because it is too well settled to admit of question, that every owner of a lot abutting on a public street, besides the ownership of the property itself, has rights appurtenant thereto, which form a part of the estate. Those rights are said to be "as much property as the lot itself." Of these may be named an easement for the free admission of light and pure air, and the right of ingress and egress to and from his property: *Rude v. St. Louis*, 93 Mo. 413; *Lackland v. North Missouri R. R. Co.*, 81 Mo. 183; *Story v. New York etc. R. R. Co.*, 90 N. Y. 145; 43 Am. Rep. 146; *Adams v. Chicago etc. R. R. Co.*, 89 Minn.

286; 12 Am. St. Rep. 644; *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62; 31 Am. Rep. 306.

In the last case cited the right is well expressed as follows: "Every lot-owner has a 'peculiar interest in the adjacent street, which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises,' which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner." Depriving the owner of these incorporeal hereditaments, or interfering with their full enjoyment by appropriating the street to a new and different public use to that originally contemplated, would undoubtedly be a damage within the foregoing constitutional provision.

In the case of *Van De Vere v. Kansas City*, 107 Mo. 91, 28 Am. St. Rep. 396, the question as to what would constitute a damage, where there was no physical invasion of the property itself, was very carefully considered by this court. After quoting approvingly the views of some of our most eminent text-writers, the court, speaking through Judge Black of the right of one to recover damages, said: "What we do say is this, that he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected." We think a public use which would interfere with these incorporeal rights, whereby the property was depreciated in value, would be a damage to the property within the meaning of the constitution, and would entitle the owner to compensation.

2. The vital question in this case we do not think turns upon the character of the rights of plaintiffs which were interfered with, but whether there was an interference at all. In other words, the question is whether laying the railroad track in the street, on grade, under municipal authority, and operating the road in the usual manner, was applying the street to a new public use which required the payment of compensation for damages to the property, or whether doing so was merely exercising by authority a right which had resided with the public since the dedication of the land to public uses.

When land is dedicated generally and without restrictions, or condemned for a public street in a town or city, the owner of the abutting lots who secures the benefit of the street, and

persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction on the public use, new modes of use may be adopted which are consistent with the proper use of the street without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street. Judge Norton, expressing the opinion of a majority of this court in a recent case, says: "I think it may be safely affirmed that all the authorities to which we have been cited by counsel on both sides of this case agree that when the public acquires a street, either by condemnation, grant, or dedication, it may be applied to all uses consistent with and not subversive of the proper uses of a street, and not inconsistent with the uses contemplated in the dedication, grant, or condemnation, and that it is only when the street is subjected to a new servitude inconsistent with and subversive of its use as a street that the abutting owner can complain": *Julia Building Assn. v. Bell Tel. Co.*, 88 Mo. 273; 57 Am. Rep. 398.

3. There has been great diversity of opinion among the courts of this country as to whether, though under proper legislative authority, laying a track on the established grade and operating a steam railroad thereon in the transaction of commercial business along a street, is subjecting the street to a public use not contemplated in a general grant or dedication. Whatever the rule may be elsewhere, this court has been uniform in holding that such a use is not a perversion of the highway from its original purposes: *Lackland v. North Missouri R. R. Co.*, 31 Mo. 183; *Porter v. North Missouri R. R. Co.*, 33 Mo. 128; *Cross v. St. Louis etc. Ry. Co.*, 77 Mo. 321; *Julia Building Association v. Bell Tel. Co.*, 88 Mo. 273, 57 Am. Rep. 398; *Smith v. Kansas City etc. R. R. Co.*, 98 Mo. 24; *Kansas City etc. R. R. Co. v. St. Joseph etc. R. R. Co.*, 97 Mo. 469; *Rude v. St. Louis*, 93 Mo. 408.

In the early case of *Porter v. North Missouri R. R. Co.*, 33 Mo. 128, Judge Bates says: "Upon deliberation, we think that the use of the street for purposes of a railroad, in its ordinary use as a means of travel and transportation, is not a perversion of the highway from its original purposes, and was authorized by the general assembly in the charter of

the defendant. The damage to the plaintiff's property resulting from such obstruction was *damnum absque injuria*."

Judge Henry, in *Cross v. St. Louis etc. Ry. Co.*, 77 Mo. 321, says: "Conceding the right to lay the track in the street and its proper construction at the grade of the street, the company was not liable for any inconvenience to property holders resulting from a proper and prudent operation of the road."

Judge Norton recognized the rule in *Julia Building Association v. Bell Tel. Co.*, 88 Mo. 273, 57 Am. Rep. 389; Judge Black, in *Rude v. St. Louis*, 93 Mo. 408; Judge Barclay, in *Smith v. Kansas City etc. R. R. Co.*, 98 Mo. 24; in opinions written by them respectively; and Judge Brace, in *Kansas City etc. R. R. Co. v. St. Joseph etc. R. R. Co.*, 97 Mo. 469, after stating that the only damage suggested by the lot-owner from the use of the street by the railroad is that resulting from the movement of trains, and the occupation of space on the street in doing so, says: "But that space being in a public street, the defendants' tracks having been authorized to be laid by the city, its use by the defendant for the purposes of passing to and fro over it with its trains is a legitimate use belonging to the defendant company, as well as to the plaintiff, in common with every other citizen desirous of passing over it with his vehicles."

These decisions from our own court show that the doctrine is firmly established in the jurisprudence of this state, and there is no occasion for an examination or review of the decisions of other states which hold to the contrary.

It appears from the evidence that the only substantial damage, which was special to plaintiff, and not common to the public, shown by them, consisted in the interference with their free access from the street to their factory; the obstruction of the light and air across the open street; smoke, cinders and dust from engine and cars; noise and jarring of the ground, all caused by the movement of trains. These may cause damage to, and depreciation of, the property, but the damage results from a legitimate use of the street, and which might have been anticipated by plaintiffs as a probable use when they bought their property and erected their improvements: *Cross v. St. Louis etc. Ry. Co.*, 77 Mo. 321; *Kansas City etc. R. R. Co. v. St. Joseph etc. R. R. Co.*, 97 Mo. 469.

The public use was fixed when the street was granted or dedicated. The license granted by the city to the defendant to lay its tracks upon the streets and run engines and cars

thereon, in the transportation of passengers and property, was not a rededication to a new and distinct public use, but was a mere license to use it in a way contemplated by the owner of the land when he subjected it to such uses. The lots were purchased, held and improved, not only in view of the advantages of the street, but also subject to the burdens of all consistent public uses which the increasing wants of the public might thereafter demand.

4. For any damages that may be caused by unlawful or negligent maintenance of the track in the street or by negligent use of engines or movement of trains, defendant will be liable in an action for damages. Plaintiffs have shown no ground for injunction, and the judgment is affirmed.

All concur.

HIGHWAYS—RIGHTS OF ABUTTING OWNERS.—Abutting owners on streets are entitled to ingress and egress to and from their property and to the light and air which the street affords: *Selden v. Jacksonville*, 28 Fla. 558; 29 Am. St. Rep. 278, and note with cases collected; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644, and note; *Fulton v. Short Route etc. Transfer Co.*, 85 Ky. 640, 7 Am. St. Rep. 619, and note.

EMINENT DOMAIN—PROPERTY WHEN “DAMAGED.”—Property is not “damaged” within the meaning of the constitution unless it is specially affected: *Van De Vere v. Kansas City*, 107 Mo. 83; 28 Am. St. Rep. 306, and note. Property must be actually invaded, or it must abut upon a highway which is invaded in the exercise of eminent domain to entitle the owner to recover damages: *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 151 Pa. St. 334; 31 Am. St. Rep. 762, and note, on damages to abutting owners.

HIGHWAYS—ADDITIONAL SERVITUDE—RIGHTS OF ABUTTING OWNERS.—The construction of a railway on a public street which injuriously affects an adjacent owner by interfering with the access to or drainage from his property, or the exclusion of light and air therefrom is an additional servitude for which he may recover damages: *Jones v. Erie etc. R. R. Co.*, 151 Pa. St. 30; 31 Am. St. Rep. 722, and note with the cases collected; *Theobald v. Louisville etc. Ry. Co.*, 66 Miss. 279; 14 Am. St. Rep. 564, and note; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644, and note; *Atchison etc. R. R. Co. v. Boerner*, 34 Neb. 240; 33 Am. St. Rep. 637, and note; *Penn etc Ins. Co. v. Heiss*, 141 Ill. 35; 33 Am. St. Rep. 273, and note. See extended note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 613, and note to *Fulton v. Short Route etc. Transfer Co.*, 7 Am. St. Rep. 627.

GARRETT v. KANSAS CITY COAL MINING CO.

[118 MISSOURI, 230.]

CONTRACTS.—CONFLICT OF LAWS—AGREEMENT TO FORM A CORPORATION, BY WHAT LAWS CONSTRUED.—Where specific performance of a contract to form a corporation, which is finally organized under the laws of another state, is sought in the state in which the contract was made, in which its subject matter is situated, and in which it is to be performed, and there is nothing to show that the parties intended that the organization should be effected under the laws of any other state, the contract will be interpreted in the light of the constitution and laws of the state in which the suit is brought.

CORPORATIONS.—ULTRA VIRES CONTRACT NOT ENFORCEABLE IN EQUITY.—A contract that a corporation shall issue stock as fully paid up, when in fact the payment is intentionally fictitious, is *ultra vires*, and therefore not enforceable in equity.

EQUITY.—PARTIES TO AN ILLEGAL AGREEMENT STAND IN PARI DELICTO, and neither can enforce the agreement against the other.

CORPORATIONS.—FICTITIOUS STOCK, ILLEGAL AGREEMENT FOR ISSUE OF.—A party to a contract by which a large amount of paid-up capital stock in a corporation, to be afterwards organized for the development of certain lands, is to be issued to him in exchange for his equitable rights in options on those lands, and for his services in promoting the corporation, cannot procure the enforcement of such contract, where it is apparent on the face of the instrument that his interest in the land and his services, when taken together, are nothing like a fair equivalent for the face value of the stock which he is to receive. Such a contract contravenes the express provisions of the constitution and statutes of Missouri, as well as the general policy of the law, requiring that the subscribers to corporate stock should pay in money or money's worth.

Warner, Dean and Hagerman, for the appellants.

Lipscomb and Rust, for the respondent.

MACFARLANE, J. This is a suit in equity to compel the defendants, a corporation, and its shareholders and directors, to issue to plaintiff certain shares of stock in said corporation and to register the transfer of such shares in the books of the corporation.

The petition charges that on the twentieth day of April, 1888, he and defendants, Perry, Smith, and Long, owned and held contracts on large quantities of coal land in Morgan county, comprising the "Stover Coal Mines" and other land; that on that day he, said Perry and Smith entered into contract with one E. E. Wilson, by which it was agreed that Wilson should organize a corporation with a paid-up capital of \$1,000,000, for the purpose of completing the purchase of said land and developing the mines. That Wilson for his services

was to have \$440,000 of the stock and plaintiffs, Perry and Smith, the balance of \$560,000.

The petition charged further that said Wilson had organized the corporation under the laws of the state of Kansas, and he is president, and said Perry, Smith, and Long, together with B. P. McNair and said Wilson, are shareholders and directors, and hold a controlling interest therein; that by a contract dated April 17, 1888, it was agreed that plaintiff was to have out of the \$560,000 of the stock shares of the face value of \$425,606.72 and that said Perry, Smith, and Long were to have the balance of shares of the face value of \$134,893.28; that defendants refused to issue said stock to him, but threaten to issue the whole to the said Perry, Smith, Long and said McNair.

The answer of defendants Perry, Smith, Long, and McNair charged that plaintiff had agreed to advance one-half the money to make payments on the land to avoid forfeiture of contracts, that they paid \$15,400 in cash towards payment of the land, and plaintiff had neglected and refused to pay any part; that when they went into the enterprise with Garrett, he represented that he already had a corporation organized with a capital of \$250,000, to purchase said lands, all of which was subscribed, which representations were false; that afterwards plaintiff represented that he had made arrangements with E. E. Wilson to organize a corporation with \$1,000,000 capital, and would issue and sell lands sufficient to repay them for their advances and for the purchase and payment for other land amounting in all to ten thousand acres; that on the strength of these representations, and a promise by plaintiff that he would assume the payment of \$15,000 due to Anthony Arnold as commission for the purchase of some ten thousand acres of land, they entered into the contract mentioned in the petition. They charged that plaintiff wholly failed to perform and carry out his undertakings, and in order to protect themselves from loss of the money they had advanced they entered into the organization of a new corporation.

The defendant corporation admitted that it was a corporation organized under the laws of Kansas, with a capital stock of \$1,000,000, that Perry, Smith, Long, and McNair claim the same stock demanded by plaintiff; had no information in regard to the contracts and asks the court to adjudicate as to the ownership of the stock.

We are asked in this suit to enforce the specific performance of a contract, made among the promoters of a corporation before, but in contemplation of, its organization. The corporation is asked to issue to complainant paid-up capital stock of the face value of about \$325,000. The first written agreement found in the record is made by plaintiff and defendants, Long, Perry, and Smith, and bears date April 17, 1888. It provides that Perry, Long, and Smith are "to have in full for their payment and services in the matter of the Morgan county land, comprising about ten thousand acres, bought as contemplated, \$160,000 out of the capital stock of a company to be organized; said stock to be issued under the Wilson agreement, subject to proposed encumbrance." It was "further agreed that all money expended in the purchase and development of said land is to be refunded to the persons having paid the same, if the Wilson agreement is consummated. Said Wilson agreement is that said Wilson is to assume the contracts and obligations of the parties hereto and organize a corporation with a paid-up capital stock of \$1,000,000, said land representing the entire assets of the corporation; and said Wilson is to have \$333,300, of said stock and \$300,000 in bonds, for which he is to furnish said corporation \$300,000.

The Wilson agreement referred to as the basis of this one was reduced to writing and signed by Wilson, Smith, Perry, and plaintiff at Kansas City, Missouri, April 25, 1888. This is the contract, a specific performance of which is invoked, and is as follows:

"This agreement witnesseth: That whereas L. C. Garrett, L. C. Smith, J. W. Perry, and others have an interest in and contracts and options for from six thousand to ten thousand acres of coal land in Morgan county, Missouri; and

"Whereas they are desirous of forming a corporation for the purpose of completing the purchase of said lands and developing the same, and securing the services of Edwin E. Wilson to that end.

"Now it is hereby further agreed, between said first-mentioned parties of the first part and said Wilson of the second part, that a corporation shall be organized with a paid-up capital of \$1,000,000, said capital to be represented by the value of the lands owned and contracted for by said party of the first part.

"That at once, on the organization of its said corporation, said corporation shall acquire title to the lands above referred

te, shall issue bonds to the amount of three hundred thousand (\$300,000) dollars, secured by mortgage on the said lands and coal plant. The amount of money obtained by the sale of the aforesaid bonds to be used in acquiring title to said land, and developing the same as a coal-producing property.

"Said Wilson shall become the financial agent of said corporation for the sale of its said bonds, and agrees to take over and sell the same at par, and to furnish money on account of the same to meet the requirements of said corporation in paying for said lands and developing its said property, and account for and turn over to the corporation at once all moneys received on account of said bonds.

"Said lands are to be turned over to said corporation at actual cost price, as had from the original owners, together with such reasonable commissions as have been agreed to be paid by said party of the first part, which said corporation shall pay.

"Said Wilson is to have the management of said corporation when formed, subject to the control of the board of directors, to be eleven in number, five named by Wilson, five by said first party, and one by the ten chosen.

"In consideration of all of which said Wilson is to have four hundred and forty thousand (440,000) dollars of the stock of said corporation, the balance of the stock to belong to the parties of the first part."

From the testimony of the witnesses it is established beyond a doubt that under the agreements the whole capital stock of the proposed corporation should be paid in full, by turning over to it the lands for which the parties had options and contracts, and for services rendered in its promotion; that the corporation should then issue \$300,000 in bonds secured by mortgage on the corporate property and with the proceeds the land should be paid for, the promoters should be repaid all money advanced in paying on land contracts and option, and expenses of buying the land and organizing the corporation; and the balance should be applied in developing the mines.

Now assuming that the defendant corporation, organized under the laws of the state of Kansas, is the outgrowth of the contract in question, and that plaintiff performed fully all his obligations under said contract, is he entitled to the relief sought in this suit?

Under the constitution and laws of this state no corpora-

tion has the power "to issue stock or bonds except for money paid, labor done, or property actually received; and all fictitious increase of stock or indebtedness shall be void" (Constitution of Missouri, sec. 8, art. 7; Rev. Stats., 1889, sec. 2499); and five per cent at least of every subscription shall be paid in money at the time of subscribing therefor, "and no subscription shall be received or taken without such payment."

This contract was made in this state. The property which was the subject matter thereof was situate in this state. The agreement was to be performed in this state, and it does not appear that the corporation should be organized under the laws of the state of Kansas, nor were the laws of that state introduced in evidence. The contract must be interpreted in the light of the constitution and laws of this state.

When the constitution permits a subscriber to pay for stock by labor done or property actually received, it means that the corporation must receive, in labor or property, what it was reasonably worth in money. The same rule obtains in the absence of statutory authority. Corporations must own property for the purposes of their legitimate business, and it would be but a useless formality to receive the money in payment for the stock, and return it again in payment for the property. That formality is not required, but as is said by Lord Justice Giffard in *Drummond's case*, L. R. 4 Ch. App. 772: "If a man contracts to take shares he must pay for them, to use a homely phrase, 'in meal or in malt;' he must either pay in money or in money's worth:" Cook on Stock and Stockholders, sec. 13; 1 Morawetz on Private Corporations, sec. 428.

To the same effect are the decisions in this state. The property or labor must be a "fair, just, lawful, and needed equivalent for the money subscribed:" *Liebke v. Knapp*, 79 Mo. 24; 49 Am. Rep. 212; *Shickle v. Watts*, 94 Mo. 414; *Chouteau v. Dean*, 7 Mo. App. 210.

No one can read the contracts and evidence in this case, and not be thoroughly convinced that the whole scheme, if consummated, would be contrary to public policy, a fraud on future purchasers of the stock, and in the face of the positive mandates of the constitution and laws of the state. No cash payment whatever was to be made, indeed the expenses of organization were to be refunded. Three hundred thousand dollars of bonds were to pay for the land and develop the

property, which was put into the corporation at \$1,000,000. Wilson, for selling the bonds and organizing the corporation, was to get paid-up stock of the face value of \$440,000, and the company was to issue to the plaintiff, in exchange for his equities in "contracts and options" upon which he had advanced but little if any money, paid-up capital stock of the face value of from \$300,000 to \$400,000. There is no difficulty here, as is sometimes the case, in determining whether there was an overvaluation of the property or labor. The inequality between the value of what plaintiff has put into the corporation and what he demands from it is so great as to shock the conscience.

The contract that the corporation, when organized, should issue stock as fully paid up, when in fact the proposed payment was intentionally fictitious, was an agreement that it would perform an act *ultra vires*, and which a court of equity will not enforce: *Tobey v. Robinson*, 99 Ill. 233; *Railroad v. Mowatt*, 12 Jur., pt. 1, 407; *Le Warns v. Meyer*, 38 Fed. Rep. 191.

Plaintiff and the other defendants who were parties to the illegal agreement stand *in pari delicto*, and neither can enforce the contract against the other: *Green v. Corrigan*, 87 Mo. 370; *Kitchen v. Greenbaum*, 61 Mo. 116.

It is no answer to these objections that the contract makes provision that the lands shall be turned over to the corporation at actual cost. It is apparent from the face of the contracts that the land and the services to be rendered by the promoters, taken together, were nothing like a fair equivalent for the face value of the stock to be issued. It does not matter whether the value of the land or the services were fictitious; both were provided by the contract under which plaintiff claims. That the stock of the corporation demanded by plaintiff would be largely fictitious, and that no payment in money is required under the contract, is manifest.

Neither are we embarrassed in this case with questions of estoppel, which might arise were we dealing with an unauthorized and *ultra vires* contract which had already been executed by the corporation and stockholders. Here we are asked to require the corporation to perform an executory contract between others which it would have had no authority itself to make. This we cannot do.

Judgment reversed.

All concur.

SPECIFIC PERFORMANCE OF ULTRA VIRES CONTRACT.—Equity will not enforce a contract of a corporation which is *ultra vires*: *Greenville Compress etc. Co. v. Planters' Compress etc. Co.*, 70 Miss. 669; *ante*, 681.

CONTRACTS—CONFLICT OF LAWS—PLACE OF PERFORMANCE GOVERNS.—Where a contract is executed in one state to be performed in another, the law of the latter state governs as to its validity and interpretation: *Baum v. Birchall*, 150 Pa. St. 164; 30 Am. St. Rep. 797, and note; *Waverly Nat. Bank v. Hall*, 150 Pa. St. 466; 30 Am. St. Rep. 823, and note with cases collected; *Bigelow v. Burnham*, 83 Iowa, 120; 32 Am. St. Rep. 294, and note.

EQUITY—PARTIES IN PARI DELICTO.—Where the parties to an illegal agreement are in *pari delicto*, a court of equity will interfere in behalf of neither: *Leonard v. Poole*, 114 N. Y. 371; 11 Am. St. Rep. 667; *Halloran v. Halloran*, 137 Ill. 100; *Rock v. Mathews*, 35 W. Va. 531; *Brown v. Reilly*, 72 Md. 499; extended note to *Harper v. Harper*, 7 Am. St. Rep. 587, 588.

HOLDSWORTH v. SHANNON.

[118 MISSOURI, 508.]

TRUSTEE'S SALE MADE AT UNUSUAL HOUR will be vacated if the agent of a party interested in the sale, being instructed to bid in the property for the amount of the debt, was on his way to the place of the sale, and would have arrived in time to take part therein if it had not been held prematurely; and the price realized represented scarcely more than one-fourth of the real value of the property.

JUDICIAL AND TRUSTEE'S SALES.—INADEQUACY OF PRICE, without more, unless so gross as to shock the moral sense, is insufficient to invalidate a sale either under a deed of trust or upon foreclosure or execution.

TRUSTEE'S SALE MADE BEFORE CUSTOMARY HOUR will not be sustained because the sheriff, who acted for the trustee, had other pressing duties to attend to, and therefore made the sale before the customary hour.

NOTICE.—THE PLEA OF "INNOCENT PURCHASER" IS AN AFFIRMATIVE DEFENSE, and must be affirmatively pleaded and proved.

ACTION to set aside a trustee's sale. Plaintiff sent an agent with instructions to bid for the property up to the full amount of the debt. This agent would have arrived in time to have taken part in the sale if it had occurred within the customary hours. The sheriff, acting for the trustee, held the sale at the unusual hour of 10:30 A. M., and, acting in collusion with the defendants, Hinton and Harbison, allowed them to bid in the land for one hundred and twenty-one dollars while no other bidders were present, the said defendants being fully aware that the sale was being held before the customary hour. The land was really worth about one thousand dollars. Plaintiff was willing, if a resale should be granted, to bid up to the amount of the debt due to him. The debtor

was wholly insolvent. The defendants answered with a general denial.

John T. Sturgis and O. L. Cravens, for the appellant.

W. J. Patterson, for the respondent.

SHERWOOD, J. The salient questions which lie at the threshold of the investigation necessary in regard to the merits of this controversy are three, and these: 1. Was the sale made at an unusual hour? 2. Was the property sold for an inadequate price, which, coupled with other circumstances, authorized the sale to be set aside? and 3. Are the defendants, Hinton and Harbison, to be regarded as innocent purchasers, that is, purchasers without notice and in good faith?

Of these in their order.

1. As to the first. The preponderance of the testimony shows the sale occurred just before eleven o'clock. The testimony of Shannon, the sheriff trustee, leaves no doubt on the point if we are to look to his testimony alone; it is conclusive on the point of the sale in question having been made at an unusual hour, and conclusive also of the prevalent custom to make such sales at a later period in the day. He says: "I generally began my sheriff's sales from half past one o'clock to two o'clock in the day. In the course of my duties as sheriff I had never made a sale under a trust deed or under an execution as early in the day as I in fact made this one. I usually made them about half past one, after we had got back from dinner. . . . Had it not been for the circumstances I have related, I would not have made the sale at that time of day. In fact, I know I wouldn't; it was not the custom."

The testimony of other witnesses corroborates that of the sheriff as to the customary time of making such sales. Hinton, one of the defendants, says: "Sales are most usually made after dinner." Osborne, a witness interested in the same trustee's sale, though in regard to another tract of land, says: "The bulk (of sales) is made between twelve and five o'clock." Geyer, another witness, says: "The majority of the sales are made about one o'clock, or between one and two o'clock." Other witnesses testify about sales having occurred before the customary time as heretofore mentioned; but not one of them is able to state that such sales did not occur with the consent and in the presence of all parties in interest.

The occasional occurrence of some such sporadic instances would be but the exception which proves the rule, and would

have no more power to break the bands of the prevalent custom than would the early advent of a single swallow to break the icy chains of winter and bring on untimely wing the balmy influences of the vernal season. The finding of the circuit court was that the sale took place at an unusual hour, and we see no reason to disapprove of the correctness of that conclusion.

2. Was the land sold at an inadequate price? On this point, as might be expected, the opinions of the various witnesses differ considerably. The estimates placed upon the value of the land in litigation vary in amount from \$1 to \$4 per acre. Now, if we strike a mean between the highest and the lowest estimates of value, we find that this will place the reasonable price of the land at \$2.50 per acre, which amounts to \$400 for the tract; and this is what Hinton asked the representative of the Watkins company for it when approached by him a week or so after the sale, in order to see if an adjustment could not be effected. This 160 acres had a hewed log house on it with a stone chimney, stables and a smoke-house, and about ten acres in cultivation, also an excellent spring on the tract; and about forty acres of it, taking different portions of it for that purpose, could be put in cultivation. The sum of \$400, then, ought to be taken as a reasonable price for the land, especially so, as Wills, who was interested in the purchase of the southwest quarter, says that quarter "was worth probably \$250 to \$300"; but it is conceded on all hands that the last-named quarter, by reason of having no improvements or spring on it, was much less valuable than the one in suit. So that if \$400 is to be taken as the proper estimate to place on the value of the property in controversy, then its sale for \$121 was a sale for but little over one-fourth of its value.

The general rule is stated in the books that mere inadequacy of price without more, unless so gross as to shock the moral sense, is insufficient to set aside a sale of land made under a deed of trust, foreclosure, or execution. But in such case the sale must be fairly conducted in all other respects. Several instances have occurred where this court has set aside sales where the price was inadequate, though not grossly so, where there were other attending circumstances rendering it inequitable to let the sale in the given instance stand; as, for example, in *Stoffel v. Schroeder*, 62 Mo. 147, where the property sold under a deed of trust at \$5,000, and was worth

\$8,500, and the sale was set aside, having been made at an unusual hour, to wit, eleven o'clock A. M. It is true that case smacked of fraud, while this does not; but in one respect they are parallel in principle, that is, the trustees in the former case and the sheriff trustee in the latter, were prevailed upon to sell the property at an unusual hour, and in consequence of this, the property in the case at bar only brought about one-fourth of its reasonable value. The fact that the sheriff-trustee was pressed to attend to other duties, did not authorize him to do this to the neglect of other duties, and the detriment of other interests.

In *Vail v. Jacobs*, 62 Mo. 130, where property worth from \$5,000 to \$8,000 was struck off to the assignee of the notes, the only bidder at the sale, for \$1,000, we set the sale aside, though it was made within usual hours. In the cases mentioned, others are instanced from our own reports teaching the doctrine that a trustee, in the exercise of the power of sale, must act with the strictest impartiality and integrity, and if it appear that they have abused their trust in any manner by a fraudulent combination with anyone to the detriment of any party in interest, or even if it appear that substantial injury has resulted from their acts in failing or neglecting to discharge their duties by exercising a wise and sound discretion, equity will grant relief: *Goode v. Comfort*, 89 Mo. 313.

In *Stoffel v. Schroeder*, 62 Mo. 147, we said: "It has always been the doctrine of this court, as well as of courts elsewhere, that the mode of sale referred to, being a harsh method of disposing of the equity of redemption, should be watched with jealous solicitude and overthrown if not conducted with all fairness and integrity, and that the trustee is bound to act *bona fide*, as, in exercising the power, he becomes the trustee of the debtor, and should adopt all reasonable modes of proceeding in order to render the sale beneficial to the debtor, and cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power."

Shaw, C. J., in *Howard v. Ames*, 3 Met. 311, said: "In executing the power he becomes the trustee of the debtor, and is bound to act *bona fide* and to adopt all reasonable modes of proceeding in order to render the sale most beneficial to the debtor."

Vice-Chancellor Sir Knight Bruce uses this language: "A

mortgagee having a power of sale cannot, as between him and the mortgagor, exercise it in a manner merely arbitrary, but is, as between them, bound to exercise some discretion; not to throw away the property, but to act in a prudent and business-like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable": *Matthie v. Edwards*, 2 Coll. C. C. 465.

Tested by the standard thus fixed by the authorities, it cannot justly be said that the sheriff trustee fulfilled the measure of his duty if that duty be considered only with reference to the value of the property and the price which it brought.

But we need not look alone to the inadequacy of the price for which the land sold nor the unusual hour at which the sale occurred; there is yet another element presented by the testimony for consideration, and that is the fact that the agent of the plaintiff, in the exercise of due diligence, and without fault on his part, failed to reach the place of sale in time to participate therein and prevent a sacrifice of the property. This makes a stronger case than where a party, through mistake or inadvertence of himself or agent, has failed to attend a sale. Yet even in cases of that sort, relief has frequently been afforded in equity on the ground of accident or surprise. Thus, in *Williamson v. Dale*, 8 Johns. Ch. 290, plaintiffs were innocently misled as to the day of sale, and so were not present. No improper intention was imputable to the adverse party nor of unfair conduct at the sale, which was perfectly regular and fair; but the property estimated to be worth \$12,000, subject to a prior encumbrance of \$2,700, was sold for a like sum, and the sale was set aside, on the ground of surprise, equitable terms being imposed upon the applicants for relief.

In *Bixly v. Mead*, 18 Wend. 611, the plaintiff employed an agent to attend the sale and bid in the property for him; agent forgot to do so; property sold at a sacrifice; purchaser insolvent; sale set aside.

In *Howell v. Hester*, 4 N. J. Eq. 266, a second mortgagee, by mistake of her agent, was prevented from attending the foreclosure sale made under a prior encumbrance. The premises sold for an inadequate price, to wit, one hundred dollars, when worth five hundred dollars, to the prejudice of the second encumbrance; sale set aside.

So in *Seaman v. Riggins*, 2 N. J. Eq. 214, 34 Am. Dec. 200, agent of a second encumbrancer failed to reach the place of sale in time, owing to accident in missing his way, and to another unintentional mistake. The sale was advertised for one o'clock, and occurred at half-past one. Owing to the mistake and accident aforesaid the agent did not reach the point until two o'clock. The property was sold for only sufficient to satisfy the first mortgage, but was worth enough to satisfy both mortgages, and the mortgagor was insolvent; the sale was set aside on equitable terms.

In *Griffith v. Handley*, 10 Bosw. 587, defendant's attorney made a mistake as to the day of sale; property sold greatly under value, without much competition. Held, a case of surprise, which, coupled with inadequacy of price, justifies setting the sale aside, which was done.

In another case the petitioner holding the equity of redemption, and, innocently misled as to the day of sale, was prevented from attending, and in consequence the property was sold for about sixty per cent of its value. Held, such a case of surprise, coupled with inadequacy of price, as justified setting the sale aside: *Wetzler v. Schaumann*, 24 N. J. Eq. 60. To the same purport is *Collier v. Whipple*, 13 Wend. 224.

In *Hoppeck v. Conklin*, 4 Sand. Ch. 582, the defendant in a foreclosure suit, liable for any deficiency, intended to be present at a foreclosure sale, but was prevented by being detained as a juror, and vainly tried to get the court to excuse him, and, failing in this, wrote to an entirely reliable agent to represent him, and bid in the property for him. Letter failed to reach agent till an hour after sale; property bid in by complainants for one-third of its value, leaving a large deficiency. Court ordered a resale. It is true these cases from which quotations are just made were foreclosure cases where deeds had not been executed; but they serve to illustrate the doctrine of courts of equity on the point in hand.

In the case at bar the plaintiff had done everything required of him. No just charge of negligence can be laid at his door. He had even gone further than parties in interest had gone in the cases instanced; for he had written a letter to Shannon informing him that they wished an attorney to represent them at the trustee's sale, and this only a few weeks before it occurred. It was the duty of the sheriff to have remembered this letter, and, even if the sale had occurred at a regular hour, to have postponed the sale for a short time, and

awaited the arrival of the expected agent: *Seaman v. Riggins*, 2 N. J. Eq. 218; 84 Am. Dec. 200. But the failure of the sheriff to remember should not operate detrimentally to the interests of the plaintiff, whose only hope for the satisfaction of his debt is the relief he seeks.

8. Are the defendants to be regarded as purchasers without notice and in good faith? There is sufficient testimony in this record to show notice to them before they paid the purchase money; but they cannot occupy the attitude of such purchasers for the reason that their pleading does not warrant it. Their answer was a general denial. The plea of "innocent purchaser" is an affirmative defense, and must be affirmatively pleaded and proven; the *onus* lies on the pleader.

In *Frost v. Beekman*, 1 Johns. Ch. 288, Chancellor Kent says: "If a purchaser wishes to rest his claim on the fact of being an innocent *bona fide* purchaser, he must deny notice, though it be not charged; he must deny fully and in the most precise terms every circumstance from which notice could be inferred." See also *Halsa v. Halsa*, 8 Mo. 803, and *Sillyman v. King*, 36 Iowa, 208, and cases cited.

For the reasons aforesaid, judgment affirmed.

GANTT, P. J., concurs; BURGESS, J., in affirming the judgment, but reserves his opinion on the question of pleading.

EXECUTION SALE MADE TWO DAYS BEFORE THE DAY FIXED IN THE NOTICE of the sale conveys no title where the purchaser had actual or constructive notice of the irregularity: *King v. Cushman*, 41 Ill. 31; 89 Am. Dec. 306. An execution sale made at an unseasonable hour is void as to persons having knowledge of the facts: *McNaughton v. McLean*, 73 Mich. 250.

SHERIFF'S SALES—EFFECT OF INADEQUACY OF PRICE.—Though a mere inadequacy is not ordinarily sufficient to set aside a sheriff's sale, yet if the inadequacy is great the sale may be set aside upon slight additional irregularity: *Lorton v. Rodgers*, 129 Ill. 554; 32 Am. St. Rep. 214, and note; *Smith v. Huntoon*, 184 Ill. 24; 23 Am. St. Rep. 646; note to *Weaver v. Nugent*, 13 Am. St. Rep. 800. A sheriff's sale of lands under execution will be set aside on the timely application of the defendant on proof of gross inadequacy of price: *Ponder v. Cheever*, 90 Ala. 117. Gross inadequacy of price is of itself insufficient to set aside an execution sale, though it may be regarded as strongly indicative of fraud: *Smith v. Perkins*, 81 Tex. 152; 26 Am. St. Rep. 794, and note.

BONA FIDE PURCHASER—PLEADING.—A defendant who would avail himself of the defense of purchaser for value without notice must put it in issue by his pleadings: *Rover Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285, and note; *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314, and note; *Cummings v. Coleman*, 7 Rich. Eq. 509; 62 Am. Dec. 402, and note.

BAISLEY v. BAISLEY.

[118 MISSOURI, 544.]

ACTIONS AGAINST NONRESIDENTS.—A statute providing that when a defendant is a nonresident he may be sued in any court of the state applies to all suits, whether *in rem* or *in personam*.

PROCESS—SERVICE OF ON NONRESIDENT SUITOR.—A nonresident plaintiff who voluntarily attends court in the state where suit is brought is amenable to ordinary civil process in another action.

JUDGMENT—FINDINGS OF JURISDICTION HOW FAR CONCLUSIVE.—As long as the judgment of a competent court, deciding that it has jurisdiction of a suit against a nonresident, stands unreversed, the defendant is precluded from pleading to the jurisdiction in any other court to which the suit may be removed.

PROCESS—APPLICATION FOR CHANGE OF VENUE IS AN IMPLIED WAIVER OF SERVICE OF.

PROCESS—AGREEMENT FOR CONTINUANCE IS EQUIVALENT TO GENERAL APPEARANCE IN ACTION. The question of want of jurisdiction by reason of improper service of process cannot afterwards be raised.

WHILE the defendant to a suit, brought by attachment in Chariton county, Missouri (both he and the plaintiff being residents of Baker county, Oregon), was in attendance upon the proceedings, the plaintiff brought an action for libel against him, and procured service on him in the ordinary manner. He filed a plea to the jurisdiction on the ground of the nonresidence of both parties. This plea was overruled, and the case was then, on his application for a change of venue, transferred to Carroll county. The trial of the case was fixed for the March term, 1887, and during that term "continued by agreement of plaintiff and defendant to the next term." The defendant having procured leave to file his answer in vacation, renewed his plea to the jurisdiction on the same grounds as before, and also pleaded to the merits. The replication was a general denial, and also, as regards the plea to the jurisdiction, a plea of former adjudication. Only the plea to the jurisdiction was tried, the result being a judgment for the defendant, from which the plaintiff appealed.

Kinley and Kinley, for the plaintiff in error.

O. Hammond and Son, for the defendant in error.

SHERWOOD, J. The fourth clause of section 2009, of the Revised Statutes of 1889, provides that: "When all the defendants are nonresidents of the state, suit may be brought in any county in this state." It will be observed that this clause is without limitation or restriction.

Suits then, that is, all suits, whether by proceedings *in rem* or *in personam*, are allowed to be brought in any county in this state against a nonresident, and the mere fact of the party's nonresidence, without more, is one of the grounds for an attachment: Rev. Stats., sec. 521. From an early day in this state it has been ruled that one nonresident may sue another by attachment in this state: *Posey v. Buckner*, 8 Mo. 604; *Graham v. Bradbury*, 7 Mo. 281; though the statute concerning attachments contains no mention of nonresidents as suitors in our courts.

When the action is commenced by attachment the suit must contain a summons to the defendant: Rev. Stats., 1889, sec. 538. Whether the present plaintiff was personally served with process in the attachment suit does not appear; but if he was, then such service would authorize a general judgment against him; and the like result would follow if he entered his appearance to the action: Rev. Stats. 1889, sec. 561. So that, if the contention of the defendant is to prevail, it would be perfectly competent for him to recover a general judgment against the plaintiff in his attachment suit, but very improper and illegal for the plaintiff to recover a like judgment against him in the libel suit.

In the recent case of *Christian v. Williams*, 111 Mo., 429, we held that where a person was attending court in this state in the capacity of party in a county other than that of his residence, that he might be sued in the county of the forum of his attendance, and that under the first clause of said section 2009 he was "found" within the meaning of that clause, if the sheriff served process on him, and that in such circumstances he could not successfully plead to the jurisdiction of the court where he was thus served. In thus construing that clause of the section we gave the word "found" its ordinary meaning, and we do not see why we should not do the like in construing the fifth clause of the same section, and accord to its words their usual import and customary meaning. The defendant is a nonresident; being such, he may be sued in any county in the state; for so the statute provides, and it must control. The statute makes no exceptions, and we are not authorized to make any.

Besides, the defendant, by voluntarily coming into the state of Missouri, subjected himself to the jurisdiction of our courts; certainly so under the statutory provisions already

cited: *Mowry v. Chase*, 100 Mass., 79; *Murphy v. Winter*, 18 Ga. 690; 2 Freeman on Judgments, 4th ed., sec. 566.

Again no authority goes to the extent of holding that a person going into another state may not be sued just like an inhabitant of such state; and it is difficult on principle to see why a nonresident may be validly served with summons in a civil action a few days before court convenes, and yet the service of similar process be invalid the day after court convenes.

We think the better rule is that announced in Connecticut, where it is held that a nonresident party plaintiff who voluntarily attends court in that state is as amenable to ordinary civil process in another action as if he were a resident: *Bishop v. Vose*, 27 Conn. 1.

2. But granting that the defendant is right in his contention that the service of process upon him in this action was invalid by reason of the matters set forth in his plea to the jurisdiction of the Chariton circuit court, how can his contention prevail against the solemn judgment of that court deciding that plea and the matters therein contained against him? That judgment still stands unappealed from and unreversed, and therefore the matters contained in that plea have passed *in rem judicatam*: 1 Herman on Estoppel, sec. 472; *Dwight v. St. John*, 25 N. Y. 203; *Obear v. Gray*, 73 Ga. 455; *Hawk v. Evans*, 76 Iowa, 598, 14 Am. St. Rep. 247; *Frauenthal's Appeal*, 100 Pa. St. 290; *Almy v. Daniels*, 15 R. I. 812; *Kaufman v. Schneider*, 85 Ill. App. 256; *Woolley v. Louisville Banking Co.*, 81 Ky. 527; 2 Black on Judgments, secs. 691, 692.

And the rendition of the judgment by the Chariton circuit court on the issue joined as to jurisdiction was equally a bar whether correct or erroneous: *Hagerman v. Sutton*, 91 Mo., 519, and cases cited. When that judgment was rendered, the question of jurisdiction was no longer at issue in the case, this must be true or else the proceedings on the question of jurisdiction in the Chariton circuit court, inclusive of the judgment rendered on the defendant's plea, only amounted to a judicial farce. If the defendant had been desirous of properly saving his exceptions to the action of that court he should have filed his motion to set aside the judgment for a new trial, and, upon that motion being overruled, he should have saved and preserved his exceptions; but even then the question of jurisdiction would still have been *res judicata* in

the Carroll circuit court; nothing but the revising hand of an appellate court could have corrected the error, if error there was, in the ruling and adjudication of the court of first instance. When, therefore, the cause reached the Carroll circuit court, the question of jurisdiction being no longer an open one, there was nothing left for the Carroll circuit court to try but the cause on its merits.

3. But, aside from anything contained in the foregoing observations, all right to question the jurisdiction of the Chariton circuit court ceased when the defendant applied for a change of venue. This was such an appearance as waived proper service of process and admitted the jurisdiction of the court over the person of the defendant: *Feedler v. Schroeder*, 59 Mo. 364. And that court certainly had jurisdiction over the subject matter of the action, to wit, over that class of cases.

4. But further on that head: When, as already stated, the cause reached the Carroll circuit court, the cause was continued by "agreement of plaintiff and defendant to the next term of said court." This too was tantamount to a general appearance by the defendant in the case: *Bohn v. Devlin*, 28 Mo. 319; *Orear v. Clough*, 52 Mo. 55; *Peters v. St. Louis etc. R. R. Co.*, 59 Mo. 406.

The case of *Higgins v. Beckwith*, 102 Mo. 456, holds nothing to the contrary of what is here asserted.

5. We reverse the judgment and remand the cause to the Carroll circuit court to be tried on its merits; as, for the reason stated, the circuit court of Chariton county had jurisdiction of the parties, and, even if it had not, its ruling and judgment, no steps having been taken to set aside the same, were *res judicata*, and precluded all further inquiry into the question of jurisdiction.

GANTT, P. J., concurs, BURGESS, J., not sitting.

PROCESS—PRIVILEGE OF NONRESIDENT SUITOR.—A nonresident suitor attending court in the prosecution of a suit is not exempt from the service of summons against him in another suit: *Baldwin v. Emerson*, 16 R. L. 304; 27 Am. St. Rep. 741, and note. The contrary doctrine is maintained by *Parker v. Marco*, 136 N. Y. 585; 32 Am. St. Rep. 770. See also the extended note to *In re Healey*, 38 Am. Rep. 718.

PROCESS—WAIVER OF BY APPEARANCE: *German Bank v. American etc. Ins. Co.*, 83 Iowa, 491; 32 Am. St. Rep. 316, and note with cases collected; *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135, and note; *Hausman v. Burnham*, 59 Conn. 117; 21 Am. St. Rep. 74; *Union Pac. Ry. Co. v. De Rusk*, 12 Col. 294; 13 Am. St. Rep. 221, and note.

APPEARANCE—STAY WHETHER EQUIVALENT TO.—Taking a stay of the order of sale in a foreclosure suit is equivalent to an appearance: *Fraser v. Armbruster*, 28 Neb. 467; 26 Am. St. Rep. 345, and note discussing the subject.

JUDGMENTS—CONCLUSIVENESS OF FINDINGS OF JURISDICTION.—A judgment conclusively establishes the existence of jurisdictional facts recited by it, so far as collateral proceedings are concerned: *Ex parte A & M*, 77 Cal. 198; 11 Am. St. Rep. 263; *Ex parte Starnes*, 77 Cal. 156; 11 Am. St. Rep. 261, and note with the cases collected; *Goodwin v. Sims*, 86 Ala. 102; 11 Am. St. Rep. 21, and note. That the recital of jurisdictional facts in a judgment is conclusive of jurisdiction, see the extended note to *Mellie v. Simmons*, 30 Am. Rep. 748-752.

PATTON v. BRAGG.

[113 MISSOURI, 595.]

TRIAL.—A DEMURRER TO THE EVIDENCE admits every fact which may fairly be inferred therefrom.

FRAUDULENT CONVEYANCES—INDIRECT GIFT BY DEBTOR TO HIS WIFE.—

If an insolvent judgment debtor conveyed all his interest in his father's estate to his brother, who immediately afterwards conveyed some of the same lands to the debtor's wife, the court, in the absence of any pleading or evidence to show that the wife paid for the land out of her own means, may reasonably find that the property thus acquired was paid for with the means of the husband, and, such a fact being found, the transaction, though no proof of actual fraud is given, must be pronounced fraudulent in law as to existing creditors.

FRAUDULENT CONVEYANCE OF PART ONLY OF DEBTOR'S LANDS.—If an insolvent judgment debtor conveys lands to his brother, who transfers them to the debtor's wife, the transactions being really a gift to the wife in fraud of existing creditors, the fact that the debtor has an interest in other lands, upon which the same judgment is a lien, is no defense to an action by the judgment creditor to set aside the conveyance and to subject the property to the lien of his judgment.

John A. White and J. L. Berry, for the appellant.

R. P. Giles, for the respondents.

GANTT, P. J. This is a suit in equity to set aside a deed from W. K. Bragg to Della Bragg on the ground of fraud, and to subject the land thereby conveyed to the satisfaction of two transcript judgments in favor of plaintiff against Lycurgus Bragg, the husband of defendant, Mrs. Della Bragg. The defendant, Agnew, was made a party on account of his interest in the land, the same having been mortgaged to him for \$1,000, June 29, 1889. The answer was a general denial.

At the trial it was shown that on the twenty-eighth day of July, 1888, the plaintiff recovered a judgment against the de-

defendant, Lycurgus Bragg, for \$131.71 and \$5.45 costs before J. W. Evans, J. P., of Clay township in Shelby county, Missouri, and on the same day execution was issued thereon to R. E. Dale, constable of said township, returnable in ninety days, and on the thirtieth day of July, 1888, a transcript of this judgment was duly filed in the office of the clerk of the circuit court of Shelby county in said state, to secure a lien on real estate.

The plaintiff also recovered a judgment against said defendant, Lycurgus Bragg, on said twenty-eighth day of July, 1888, before said J. W. Evans, J. P., for the sum of \$100 and \$5.80 costs, a transcript of which was duly filed the thirtieth day of July, 1888, in the office of the said clerk of the circuit court of Shelby county aforesaid to secure a lien on real estate, and that execution was issued by said justice thereon on the thirtieth day of July, 1888, to R. E. Dale, constable of said township, returnable in ninety days.

That both of said transcripts so filed were by said clerk of the said circuit court duly recorded in his said office in a book by him then and there kept for that purpose. That on the twenty-ninth day of October, 1888, the said executions so issued in both of said cases were by R. E. Dale, constable as aforesaid, duly returned "No property found in Shelby county of the defendant whereupon to levy." That afterwards, on the fifth day of June, 1889, supplemental transcripts of the docket of the justice of the peace in said cases were duly filed in the office of said clerk of the circuit court of Shelby county aforesaid showing the issuing of said executions on said judgments and the return of said constable of "no property found," as aforesaid.

It was also shown that on said thirtieth day of July, 1888, transcripts were filed in the office of said clerk of two judgments rendered before said justice in favor of Sommer, Lynde & Co., and against said Lycurgus Bragg, one for \$122.35, and the other for \$69.39.

That in October, 1888, after the plaintiff had procured his said judgment liens as aforesaid, S. J. Bragg, father of defendant, Lycurgus Bragg, died intestate, seised of a large tract of land in Shelby county, in the state of Missouri, to wit: The south half and the south half of the northeast quarter, and the northwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter of section 28, township 59, range 9, except eleven acres in the northwest

corner of the northwest quarter of the northeast quarter, also west half of the southwest quarter and the south half of the southwest quarter of the northwest quarter of section 24, township 59, range 9, containing five hundred and sixty-nine acres, and including the land in suit. The defendant, Lycurgus Bragg, was an heir, and entitled to, and became seised, as shown by the testimony offered by the plaintiff, of his share in said real estate. That in the spring of 1889 the said Wm. K. Bragg bought out the interest of the other heirs, paying to Samuel B. Bragg, a brother, for his interest, the sum of one thousand dollars.

The evidence of W. G. Sanders, the sheriff of Shelby county, tended to show that Lycurgus Bragg was utterly insolvent. In June, 1889, Lycurgus Bragg and wife conveyed all his interest in his father's lands to William K. Bragg, by quitclaim in which another brother and sister joined. The consideration named was \$3,000. On the 28th of June, 1889, William K. Bragg and wife conveyed a part of the same land to the defendant, Della Bragg. On June 29th the mortgage to Agnew was executed to secure a joint note of Lycurgus and Della Bragg, for \$1,000, of date May 6, 1889. Another deed of trust of May 6, 1889, was read in evidence, given by same parties to Agnew to secure \$1,000. There was no evidence to show what was Lycurgus Bragg's interest in his father's estate, and we are left to infer or surmise as to its value from the consideration named in the deeds.

At the close of plaintiff's case, defendant offered a demurrer to the evidence, and it was sustained. After an ineffectual effort to obtain a new hearing, the plaintiff appealed to this court.

1. The demurrer to the evidence admitted every fact which the trial court might fairly infer therefrom. By sustaining it, the circuit court determined as a matter of law that even though he should believe all the evidence offered, plaintiff could not recover: *Healey v. Simpson*, 113 Mo. 840. This necessitates an inquiry as to the effect of this evidence, conceding its credibility. From this testimony he must have found: 1. That Lycurgus Bragg was insolvent, and that the sheriff, with four several executions against him, had not been able to find any property out of which to satisfy either of them; and 2. That a brother of Lycurgus Bragg, immediately after receiving a deed to the interest of Lycurgus in his father's estate, had conveyed a portion of the same lands to

Della Bragg, the wife of Lycurgus. Combining the two ultimate facts thus found, the court, in the absence of any pleading or evidence to show that the wife had paid for this land out of her own means, could have reasonably found what the law presumes, that this property thus acquired during coverture, was paid for with the means of her husband: *Sloan v. Torry*, 78 Mo. 623; *Weil v. Simmons*, 66 Mo. 617; *Seitz v. Mitchell*, 94 U. S. 580.

Having found a conveyance to her during coverture, obtained with his means, it was not necessary that any actual fraud on her part should be shown. The transaction as to the plaintiff, who was an existing creditor, was fraudulent in law: *Jordan v. Buschmeyer*, 97 Mo. 94. Having found the conveyance was fraudulent, the trial court should have found the land was the property of the husband, and plaintiff's judgments were a lien thereon, and rendered the decree as prayed.

The fact that Lycurgus Bragg had an interest in his father's lands, upon which plaintiff's judgments were liens, is no defense to this action. If, as this evidence tends to show, he was the owner of this tract conveyed to his wife, the judgments were also liens upon that, and plaintiff might have levied upon either, and it is not for defendants to question his right or dictate terms, under the pleadings in this case and the facts shown. The maxim of a complete remedy at law has no application here.

Conceding then to plaintiff every fact which his evidence tended to prove, and every fair inference to be drawn therefrom, it seems clear he was aggrieved by the judgment of the circuit court, and the judgment is accordingly reversed, and the cause remanded for proceedings in accordance herewith.

All concur.

DEMURRER TO EVIDENCE—EFFECT OF.—A demurrer to the evidence admits all that may be reasonably inferred from the evidence given by the opposite party, and waives all evidence in conflict therewith, or the credibility of which is impeached, and all inferences from the evidence of the party demurring which do not necessarily follow from it: *Williamson v. Newport News etc. Co.*, 34 W. Va. 657; 26 Am. St. Rep. 927; *South West Imp. Co. v. Smith*, 85 Va. 306; 17 Am. St. Rep. 59; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 303; 10 Am. St. Rep. 136, and note; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; 3 Am. St. Rep. 92.

FRAUDULENT CONVEYANCE—INDIRECT CONVEYANCE FROM HUSBAND TO WIFE.—Conveyances between husband and wife by the aid of a third person

will be closely scrutinized, though they are not necessarily fraudulent, and may be deemed valid to the extent of the consideration passing: *Steck v. Coon*, 27 Neb. 586; 20 Am. St. Rep. 705, and note with the cases collected. See also the extended note to *Wilder v. Brooks*, 88 Am. Dec. 55.

MADDOX v. MADDOX.

[114 MISSOURI, 35.]

WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE.—EVIDENCE that the contestants of a will had twenty-five years prior to its execution worked as farm hands on the testator's farm is irrelevant and incompetent to prove his testamentary capacity or undue influence exerted over him by two of his sons.

WILLS—TESTAMENTARY CAPACITY—TEST OR.—The competency or incompetency of a testator to engage in or understand any complicated matter or transaction in business is not a proper test of his mental capacity to execute a will.

WILLS—TESTAMENTARY CAPACITY.—A man may have mental capacity to make a will, and yet be incapable of making a contract or managing his estate.

WILLS—TESTAMENTARY CAPACITY.—A testator, though aged and infirm, is not incapacitated from making his will, if he understands the business in which he is at the time engaged, and has mind and memory capable of presenting to him his property and the persons who are the natural objects of his bounty, and of understanding the distribution of his property as made by the will.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—When a will is contested on the ground of want of mental capacity in the testator and of undue influence exercised over him, the burden of proof is on the proponents of the will to prove its proper execution and attestation, and also that the testator was of proper age and sound mind. When these facts are shown, a will *prima facie* valid is established, and it then devolves upon the contestants to prove fraud or undue influence.

WILLS—UNDUE INFLUENCE.—WHEN A CONFIDENTIAL RELATION is shown to exist between a testator and the recipient of his bounty, his influence is presumed to have induced the bequest, and the burden of proof is cast upon the beneficiary to explain the transaction and establish that it is reasonable.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—If a testator and two of his sons, claimed to have been unduly favored in his will, lived on separate farms, and they never interfered in his business nor were they intrusted with its management or control, nor called upon for advice, though they visited him frequently, the burden of proof is upon the less favored sons who are contesting the will to prove that it was not voluntarily made by the testator, but was the product of the will of the proponents.

WILLS—UNDUE INFLUENCE—EVIDENCE.—Undue influence can seldom be proved by direct and positive evidence, and when extreme age and possible susceptibility to influence are shown in respect to a testator in the execution of his will, and an undue portion of the estate is granted to

one to the exclusion or partial exclusion of another having equal or greater demands upon his bounty, every fact and circumstance surrounding the parties at the time of the execution of the will, and which bears upon it, will be examined with the utmost scrutiny to ascertain whether or not it was the product of fraud or undue influence. But the mere fact that unjust discrimination was made, coupled with the facts of old age and great debility of body, is not alone sufficient to raise a presumption that undue influence was exerted by one who received the greater portion of the estate under the will.

WILLS.—TESTATOR MAY MAKE AN UNREASONABLE, UNJUST, AND INJUDICIOUS will, and it will still be valid if he is possessed of mental capacity and acts as a free agent at the time of its execution.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—When a will is contested on the ground of undue influence exercised by its proponents toward the testator, the contestants must introduce some evidence from which undue influence may be inferred before the burden of proof is shifted to the proponents to explain unequal or unnatural provisions in the will.

WILLS—UNDUE INFLUENCE—PRESUMPTION.—When a will is contested on the ground of undue influence exerted by its proponents over the testator, and they place themselves on the witness-stand and are subjected to cross-examination, no inference can be drawn against them from the fact that they offer no voluntary explanation of unequal and probably unnatural provisions in their favor as contained in the will.

W. R. Anderson, and Harrison and Mahan, for the appellants.

W. M. Boulware, for the respondents.

MACFARLANE, J. This is a statutory contest over the validity of the will of James Maddox, deceased. The will was executed December 7, 1887, and the testator died March 4, 1887, leaving surviving him his wife, four sons—Henly J., John F., Jesse P. (called Prior), and William Maddox—one daughter, Matilda, wife of Benjamin D. Morton, and the children of a deceased daughter, a former wife of said Morton.

The will is contested by two sons, Jesse P. and William D. Maddox, on the ground of the want of testamentary capacity of the testator, and the exercise of undue influence by defendants, Henly J. and John F. Maddox. A jury trial resulted in a verdict and judgment against the validity of the will, and defendants appealed.

By his will the testator charged his children with advancements as follows: Henly, \$2,232.50; John, \$939.50; Benjamin D. Morton, \$1,231.4 on account of first wife; Matilda Morton, \$651.50; Jesse P., \$1,092.50. The will then provides that John should be made equal with the advancement made to Henly, and be paid \$1,000 additional to make up for the time at which it was paid. It directs that \$1,000 each for

William and Jesse be held by the executors in trust to pay them the income during life, and at their death \$1,000 to be divided between Henly and John "for their trouble and care of Jesse P. and William," and the other \$1,000 to be paid the children of Morton. After leaving small legacies to the children of said Morton, the residue of the estate is devised to Henly J. and John F. in equal parts. The estate passing under the will was valued at about \$11,000, more than half of it being subject to the life estate of the testator's wife to whom it was devised.

The evidence shows that the testator was about eighty years of age at the time of making the will. That he was in feeble health for a year or two before his death. His right hand was "shaky," he had a large wen on his neck, and suffered from asthma. He was not confined to his house on account of his feeble health when he made his will, but was able to go out, and attended to his own business up to near his death. When the will was written, the writer, Mr. Lafon, who was also one of the witnesses, and F. B. Kellar, the other witness, had before them a book in which an account of the advancements were entered. It seemed to be understood that the testator could not write, and it was not shown in whose handwriting the entries were made.

None of the children were present when the will was written. Testator dictated the will, knew the items of advancements made, and the sum of them. He explained to Mr. Lafon the provisions of the will and the desired disposition of the property and, as he testified, "especially the way in which he had provided for William and Prior. Said he thought it would be best for them to have only the interest, the principal going to Henly and John for taking care of them; that if he left William and Prior the principal it would very soon go as the balance he had given them had gone." Both the subscribing witnesses testified that his mind was perfectly clear and sound when he made his will. The two plaintiffs were each over fifty years of age, and one of them married. They were both men of feeble intellect, very deaf, and nearly, if not quite, blind, and were not able to support themselves. Henly and John were farmers, one living within a mile of testator and the other about three miles away.

At the conclusion of the evidence the court was asked by defendant to give the jury the following instructions:

"1. The court instructs the jury that there is no evidence

sufficient in law to prove, or tending to prove, that the execution of said will by James Maddox was induced by the exercise of undue influence over his mind by either Henly J. Maddox or John F. Maddox.

"2. The court instructs the jury that there is no evidence before them to justify a verdict that at the time the will was executed the said James Maddox was of unsound mind, and did not have sufficient capacity to make the same."

The court, in lieu of other instructions asked by the parties, gave a series of fifteen instructions which were intended to cover all the issues. By these instructions he told the jury that if "the said James Maddox had sufficient strength and perception of intellect and sufficient memory to know what property he owned, and to know the number and names of his children, and to form a determination in his own mind as to what disposition he desired to make of said property, then the jury should find that then and there the said James Maddox was of sufficiently sound mind to make said alleged will.

A portion of instruction 10 given was as follows:

"And if from all the evidence in the case the jury find that the contested will contained in its disposition gross inequality as against the contestants, with reference to their claims of natural affection as the children of the testator, with no reason for said inequality suggested either in the alleged will or otherwise in evidence, and that said inequality, if any, is unreasonably inconsistent with the moral duties of the alleged testator in reference to his property and family, then said inequality, if any, will require from the proponents the further proof of some reasonable explanation of such character of said alleged will, before the issue of all alleged undue influence can be found in favor of said will, unless in such event the proponents have shown by the greater weight of evidence to the reasonable satisfaction of the jury that said will was not the product of undue influence."

1. Inquiry was made of several witnesses as to what labor the plaintiffs did on the farm of the testator years before, and they were permitted to answer against the objection of defendants. The evidence of Boon Christy will sufficiently illustrate the point. He testified: "I knew James Maddox since 1860, lived near his home from 1860 to 1865. Prior and William Maddox lived on his (testator's) farm." "Q. What were they doing?" This question was objected to by defendants'

counsel as being irrelevant and immaterial to the issues, because the time is fixed between 1860 and 1865. The objection was overruled and witness answered: "They were farm hands there on the farm and doing the work of regular farm hands." The witness was examined on no other question.

We are unable to see what this evidence had to do with the questions of testamentary capacity of the testator or the influence of the defendants over him twenty-five years afterwards. It threw no light on the subject whatever. Plaintiffs insist that if it was not competent, it was because it was immaterial and was therefore not prejudicial. It must have been thought when offered that it would have an influence on the jury or it would not have been introduced. Juries are disposed to consider the moral duties of parents to their children in the disposition of their property, and all irrelevant evidence which tends to emphasize such duties should be carefully excluded. This court held in a very recent case that the admission of evidence of the same character was improper: *Couch v. Gentry*, 113 Mo. 248.

2. A witness was asked whether, in his judgment, from his knowledge and observation of the testator, he was in November preceding his death "competent to engage in or understand any complicated business matter or transaction." An objection to the question was urged on the ground that such competency was not a proper test of mental capacity requisite to make a will. The objection being overruled the witness answered: "If I had any complicated matter at that time I would not have been willing to intrust it to him to settle or manage for me." It is clear that the test here made of testamentary capacity goes beyond what has ever been required under the decisions of this court.

It is said in *Brinkman v. Rueggessick*, 71 Mo. 556, by Napton, J., that "it is conceded in most of the cases that a man may be capable of making a will and yet incapable of making a contract or managing his estate," and in the case of *Couch v. Gentry*, 113 Mo. 248, it is said: "If the testator understood the business about which he was engaged when he had prepared and executed his will, the persons who were the natural objects of his bounty, and the manner in which he desired the disposition to take effect, he was capable of making a will." Competency "to engage or understand any complicated business matter or transaction" requires too high a grade of capacity when compared with what is required un-

der these decisions. Under that test a majority of men would be incapable of making a will.

3. It is next insisted that the testator was shown to have been in the possession of sufficient mental powers to enable him to make a will, and there was no evidence of the want of such capacity as would disqualify him, and on that issue the jury should have been instructed peremptorily to find the will valid. After a careful reading of the evidence we are of the opinion that defendants are right in their position, and the second instruction asked by them should have been given.

Counsel for plaintiff, in argument, rely solely on the evidence of the two witnesses to establish want of capacity, the witness Bashore, who expressed the opinion that deceased was not capable of engaging in or understanding any complicated business matter or transaction, and of a witness named Hutchinson. As has been shown the testimony of the former did not tend to prove a want of capacity to make a will. The witness Hutchinson had been employed by deceased in the fall of 1886 to build some fencing. His evidence, so far as it bears upon the condition of the mind of the testator at that time, was as follows:

“He was to give me six cents a panel and board me; that was the arrangement with him; he settled with me as soon as I finished. I saw that he was not in as good health as in 1880, his strength of mind and memory was not as good in 1886 as in 1880. When we made our settlement he seemed to have figured it up and made it more than I did, and seemed willing to take my calculation. I don't know whether he could do all of his business in the fall of 1886 or not; I know he did some, and came to Palmyra sometimes on business, and he also bought quite a good deal of stock while I worked there that fall; I then worked there about four weeks.”

On the other hand the two attesting witnesses testified to the soundness of his mind. Dr. McCabe, his family physician for thirty years, testified that in December, 1886, “his mind was good,” and, up to twenty days before his death, “his mental condition then was just as I have always found it, good.” Levin Hitch, an acquaintance for forty-nine years, considered him a man of sound mind. So with a number of other neighbors, merchants and bankers with whom he associated and had transacted business, all testified to the soundness of his mind and ability to attend to all his business up to a period near his death and some time subsequent to the

date of the will. The provisions of the will, which he dictated, show his knowledge of the persons who were the natural objects of his bounty, the property he possessed, the advancements made to each of his children and the disposition he desired to make of his property. Against all this evidence of capacity we have only the two witnesses, the testimony of either or both of whom, if standing alone and uncontradicted, would not, under the foregoing tests, be sufficient to overthrow the will. It matters not that the testator was aged and infirm. Those conditions did not incapacitate him if he understood the business in which he was at the time engaged, and had a mind and memory capable of presenting to him his property and the persons who were the natural objects of his bounty, and of understanding the distribution of his property as made by the will: *Norton v. Paxton*, 110 Mo. 456.

4. Defendants also contend that there was no evidence that justified a submission to the jury of the question of undue influence exercised by them over the mind and will of the testator, and therefore the first instruction asked should have been given. This assignment of error requires a further consideration of the evidence to ascertain if there is any evidence tending to prove that the will was the product of the wills of defendants, or either of them, rather than that of the testator.

That both defendants, Henly and John, were fairly prosperous farmers, and were possessed of a healthy development of mind and body, is unquestioned; and that both contestants, Prior and William, from physical and mental defectiveness were almost helpless, is not disputed. Neither of defendants were present when the will was written, and it was dictated in all of its details by the testator. No witness testified to an act, word or circumstance which tended to prove that the will of the testator was dominated by the influence of the defendants, or either of them.

Plaintiffs, for proof of undue influence, rely upon the following facts, which were shown by the evidence: Testator could neither read nor write, but had with him a book in which advancements to his children were charged, and it was not shown who had made the entries. Prior testified that there was no substantial ground for the advancements charged against him, other than the fact that for seventeen years he had the use of a house and eighteen acres of land belonging to his father. Between 1879 and the date of the will the testator was heard to commiserate the condition of contestants,

and to declare his intention of providing well for them, and that his children should share equally in his estate. Defendants were frequent visitors at their father's house, and John lived on and had charge of the home farm for seven years at one time, he and his father dividing expenses. When that was, does not appear. John testified, that he had conversations with his father about Prior and Billy, but the purport of that conversation was not asked for by either party nor given by the witness. One witness heard John say that Prior ought to go to work for himself, and not come to father for corn. When this conversation took place was not shown, nor was it shown that the father was present, nor what effect the declaration had with the testator. Both of defendants were witnesses and neither offered any explanation of the will, or what if any part they or either of them took in making it or in the disposition of the estate thereunder. They were not questioned on the subject by counsel for either party.

The *onus* is on the proponents of a will, in a contest of this character, to prove its proper execution and attestation and also that the testator was of proper age and of sound mind. When these facts are shown a will *prima facie* valid is established, and it then devolves upon those attacking its validity to prove fraud or undue influence if either is charged: *Norton v. Paxton*, 110 Mo. 456; *Gay v. Gillilan*, 92 Mo. 255; 1 Am. St. Rep. 712; Woerner's American Law of Administration, sec. 31; *Jones v. Roberts*, 37 Mo. App. 174; Schouler on Wills, sec. 239.

It is also a universally recognized rule of equity, which is applied also in analogous cases at law, that when a confidential relation is shown to exist between the testator and the recipient of his bounty an exerted influence will be presumed to have induced the bequest, and the *onus* is cast upon the beneficiaries to make explanation of the transaction and establish its reasonableness: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712; 2 Pomeroy's Equity Jurisprudence, sec. 951.

No such relation of confidence and trust was shown to have existed between the father and the favored sons. They lived on and managed separate farms, and there is no word of evidence showing that the sons ever interfered in the business of the father, or were intrusted with its management or control, or were even called upon for advice. The burden then rests upon these contestants to prove by facts or circumstances that the will was not voluntarily made by the testator, but was the product of the will of the defendants.

Undue influence, like fraud generally, can seldom be proved by direct and positive evidence. Where, therefore, extreme age and possible susceptibility to influence is shown in respect to the testator, and an undue portion of the estate is granted to one to the exclusion or partial exclusion of another having equal or greater demands upon his bounty, every fact and circumstance surrounding the parties at the time of the execution of the will, and which bears upon it, should be examined with the utmost scrutiny to see if it were not the product of fraud or undue influence. "Issues of . . . undue influence are generally determined upon circumstantial evidence and inferences drawn from a full presentation of facts inconclusive when taken separately": Schouler on Wills, sec. 242. But the fact that unjust discrimination was made, coupled with the other facts of old age and great debility of body are not sufficient to raise an inference that undue influence was exerted by one who received a greater portion of the estate. The tests are mental capacity and free agency. When these exist the testator has the right, as is said, "to make an unreasonable, unjust, injudicious will, and his neighbors have no right, sitting as a jury, to alter the disposition of his property, simply because they may think the testator did not do justice to his family connection": *Boylan v. Meeker*, 15 N. J. Eq. 310; *Mackall v. Mackall*, 135 U. S. 171, and cases cited: *Smith v. Smith*, 48 N. J. Eq. 591; *Jackson v. Hardin*, 83 Mo. 185.

The helplessness of these two sons already becoming aged can but excite the sympathy and commiseration of the just, and impress one with the conviction that the natural instinct of pater-nity and moral and social duty called for a more liberal and independent provision; but it was for the testator to say, from his own standpoint, where no one else could stand, knowing what he knew, and feeling what he felt, whether from caprice or mistaken judgment, what they should have and how it should be given.

It is said that the testator often expressed commiseration for the condition of these two afflicted sons, and the intention of making ample provision for them, and the provision made shows that some influence operated to change the purpose. The evidence shows that when dictating the will the testator spoke of providing for these two sons and expressed the belief that they would squander what might be left them absolutely, and thought the provision as made the most judicious.

So he gave them the income on one thousand dollars each, during life, of which at their death one thousand dollars should "be equally divided between H. J. Maddox and John F. Maddox for their trouble and care of Jesse P. and W. D. Maddox." It is evident from this provision that the testator supposed that defendants, from moral duty and fraternal affection, or from some understanding with them, would take care of their two afflicted brothers during life. This was doubtless the testator's idea of making the best possible provision for them; it may have been a mistaken idea and error of judgment, but there is no evidence tending to prove that the idea and judgment were controlled by the influence of defendants.

It is said that these sons made frequent visits to their father during the last years of his life, and from this circumstance we are asked to draw an inference of improper influence. We answer that in the language of another court: "It would be a great reproach to the law, in its jealous watchfulness over the freedom of testamentary dispositions, if it should deprive age and infirmity of the kindly ministrations of affection or of the power of rewarding those who bestow them": *Elliott's Will*, 2 J. J. Marsh. 340. We hope it will never be that the visits of a son to an aged and infirm parent will be looked upon with suspicion and attributed to selfish motives.

We do not think, as declared by the instruction copied into the statement and given by the court, that the mere inequality in the disposition of the property required from proponents the further proof of some reasonable explanation thereof. Before the burden of proof can be shifted to the proponents of the will, to make an explanation of unequal or unnatural provisions there must first have been some evidence from which undue influence may have been inferred, otherwise every will which may be thought to operate unjustly would be subject to what a court or jury may regard just or judicious.

We do not think the case of *Gay v. Gillilan*, 92 Mo. 261, 1 Am. St. Rep. 712, or the authorities cited in support of it go further. In that case the court say: "No one can read this record without being painfully impressed with the idea that George (the proponent) by his most unfilial conduct and threats had placed the mind of his aged and infirm father in complete subjection to his demands." In another part of the same decision the court declares the law in accord with the principles herein laid down, as follows: "And while it is true that the undue influence will not be presumed, yet, where

such facts are proved as will authorize a jury to find the existence of undue influence, then the burden shifts, and it then devolves on the party charged to exonerate himself from such charge in like manner as in the case of fiduciary or confidential relations."

If proponents had not offered themselves as witnesses, the omission may have been ground for suspicion, but they placed themselves upon the witness-stand, thereby subjecting themselves to as thorough and rigid a cross-examination as contestants desired to make. They could have been asked about the conversation with their father in reference to their two brothers; they could have been questioned as to the part they took in entering the advancements in a book, and could have been questioned in regard to any circumstances deemed suspicious. They were not questioned at all on the vital issues in the case. Under these circumstances, we think no adverse inference can be drawn from the fact that no voluntary explanation was offered.

After a careful consideration of the evidence and drawing every legitimate inference therefrom, we are convinced that there was no evidence of the invalidity of the will, and the judgment is therefore reversed and cause remanded.

All concur except BARCLAY, J., not sitting.

WILLS—UNDUE INFLUENCE.—This question is exhaustively treated in the monographic note to *In re Hess's Will*, 31 Am. St. Rep. 670-691, and see, also, *Harrison v. Bishop*, 131 Ind. 161; 31 Am. St. Rep. 422, and note, where the questions of the capacity to make a will and the burden of proving undue influence are discussed.

ATKINSON v. BRADY.

[114 MISSOURI, 200.]

PARTITION—ESTATE IN REMAINDER.—The owner of an estate by curtesy together with an undivided interest in the remainder is entitled to partition as to the latter, against the remainder-men.

PARTITION—ESTATE HELD BY ONE BY CURTESY ONLY is not subject to partition as against the remainder-men.

Stauber and Crandall, for the appellant.

Hall and Pike, for the respondents.

BURGESS, J. This is an action in partition. The petition shows that Nellie Brady died in 1889, seised of certain real estate in Buchanan county, and left surviving her a husband

and five children; that plaintiff succeeded to the curtesy interest of the husband and the share of one of the children of deceased; sets out the interests of the other defendants, and prays for partition.

The defendants demurred to the petition, on the ground that plaintiff being the owner of the curtesy and the undivided one-fifth interest in the remainder only, was not entitled to have the land partitioned. The demurrer was sustained, and the plaintiff declining to plead further, judgment was rendered for defendants, from which plaintiff appeals to this court.

It will be observed from the foregoing statement that the sole question presented in this case for our consideration is whether the plaintiff, being the owner of the curtesy, together with an undivided one-fifth interest in the remainder, is entitled to have partition of such an estate as against the other defendants, owners of the estate in remainder.

Section 7132 of the Revised Statutes of 1889, provides that when lands, tenements or hereditaments are held in joint tenancy, tenancy in common or coparcenary including estates in fee for life or for years, tenancy by the curtesy and in dower, any one or more of the parties interested therein may file a petition in the circuit court of the proper county asking for the admeasurement and setting off any dower interest therein and partition of the remainder. While by the terms of this section of the statute a person being a tenant by curtesy may bring his suit in partition to have the estate partitioned, that clause has application only to estates held in common; for instance, an estate in which the deceased wife and some other person or persons owned the property as tenants in common at the time of the demise of the wife, at the time the curtesy rights of the husband attached, or acquired such rights afterwards and held it jointly with some other person, then as a matter of course he could have his rights ascertained and his interest set off by a suit for that purpose: Freeman on Co-tenancy and Partition, 2d ed., sec. 456. But it has no application to the case at bar, for the reason that the husband's rights are fixed by law—he owns the entire estate during his life, and there is nothing, so far as this estate is concerned, to partition.

Does it follow, then, that the plaintiff, because of his having acquired the curtesy interest of the husband, and also one-fifth interest in the remainder of the estate, cannot maintain

his action for the purpose of partitioning the land, and having his one-fifth interest in the fee set off, and leaving the life estate, or his interest as tenant by the curtesy intact? If so, the demurrer was properly sustained; if not the cause must be reversed. We think the petition stated a good cause of action in so far as the plaintiff's one-fifth interest is concerned. The section of the statute above quoted authorized anyone owning an interest in real property, though subject to a life estate, dower or curtesy, to prosecute an action to have his interest partitioned subject to such estate: *Preston v. Brant*, 96 Mo. 552; *Reinders v. Koppelman*, 68 Mo. 500, 80 Am. Rep. 802; *Scoville v. Hilliard*, 48 Ill. 453; *Olley v. McAlpine*, 2 Gratt. 341. The judgment is reversed and the cause remanded, that the cause may be proceeded with and the estate partitioned subject to the curtesy.

PARTITION OF REMAINDERS AND REVERSIONS: See the monographic note to *Aydlett v. Pendleton*, 32 Am. St. Rep. 778-782, where this question is thoroughly treated.

PARTITION—RIGHT OF TENANT BY CURTESY TO DEMAND: See extended note to *Nichols v. Nichols*, 67 Am. Dec. 710.

MISSOURI LEAD MINING AND SMELTING COMPANY v. REINHARD.

[114 MISSOURI, 218.]

CORPORATIONS—MEETINGS OF STOCKHOLDERS—WHERE SHOULD BE HELD.

Under a statute providing that articles of association shall state the city or town and county in which a corporation is situated, the acts of the body corporate itself, such as elections of directors, votes to increase or diminish the stock, and other meetings of the stockholders, should take place at the home office.

CORPORATIONS—MEETINGS IN FOREIGN COUNTRY.—When there is no prohibitory statute, and all of the shareholders give their consent, their acts at a meeting of the corporation held in a foreign jurisdiction are valid.

CORPORATIONS—MEETINGS IN FOREIGN JURISDICTION.—The directors of a corporation may hold meetings and transact business in another state unless the contrary is expressly provided for by the charter, by-laws, or the general laws of the state under which the corporation is organized.

CORPORATIONS—MEETING HELD IN FOREIGN JURISDICTION.—All of the stockholders and directors of a domestic corporation may hold a meeting in a foreign jurisdiction; and their action there in making a contract for the sale of the corporate property and in directing the president to execute a deed, and his act in executing and delivering it

there, are as valid as if performed in the office of the domicile of the corporation.

CORPORATIONS—POWER TO PURCHASE LAND IN ANOTHER STATE.—A foreign corporation, which by its articles of incorporation and the laws of the state or country in which it is organized is empowered to purchase, hold, and operate mining lands in a certain foreign state or elsewhere, may purchase, hold, and operate such mines in that state unless prohibited by its laws.

CORPORATIONS—FRAUDULENT CONVEYANCE.—The fact that a domestic corporation at the time of conveying its property to a foreign corporation failed to provide for the payment of a single contested claim does not raise a presumption that the sale was made to defraud creditors when the circumstances tend to show that there was no actual fraud in the transaction.

CORPORATIONS—CAPITAL STOCK, WHEN TRUST FUND.—The capital stock and other property of a corporation constitute, as between creditors and stockholders, a trust fund for the payment of the debts; and if such property has been divided among the stockholders, leaving debts unpaid, the stockholders are in equity bound to refund.

CORPORATIONS—TRANSFER OF PROPERTY BY—REMEDY OF CREDITOR OR EXECUTION PURCHASER.—If a corporation transfers all its property to another corporation a creditor of the transferring corporation has his remedy against the old stockholders or the new corporation by bill in equity; and an execution purchaser of the property of the old corporation under a judgment in favor of such creditor is entitled to be substituted to the latter's rights only to the amount of his bid with interest.

L. F. Parker, for the appellants.

John W. Booth and T. B. Crews, for the respondent.

BLACK, C. J. The plaintiff, the Missouri Lead Mining and Smelting Company (Limited), hereafter called the English company, is a corporation organized under the laws of Great Britain; and the Virginia Lead Mining Company, hereafter called the Missouri company, is a corporation organized under the general laws of this state. The Missouri company, being the owner of six hundred and forty acres of mining land in Franklin county in this state, sold and by deed dated the 12th of January, 1880, conveyed the same to the English company, which purchasing company then took and has ever since held possession. Some three years prior to the date of the deed just mentioned a Mr. Maupin commenced suit against the Missouri company, and in April, 1885, five years after the date of the deed, recovered judgment for the sum of ten hundred and nine dollars. The six hundred and forty acres of land were sold to defendant Reinhard on the 28th of May, 1886, under an execution issued on this judgment, and he received a sheriff's deed in due form. He quitclaimed the one-half to defendant Parker.

This claim set up by the defendants to the land under the sheriff's deed has rendered plaintiff's title unmarketable. On these facts, which are admitted by the pleadings and proofs, the plaintiff prays for a decree that the title to the land be declared fully vested in it, and that defendants be enjoined from making any claim to the land, or any part thereof.

The defendants, by their answer, insisted that the deed from the Missouri company to the English company is void for various reasons, and, among others, they allege that the transaction resulting in the conveyance to the English company was without consideration, and was an intended fraud upon the creditors of the Missouri corporation, and they pray that the deed be set aside and for naught held.

The circuit court entered a decree according to the prayer of the petition, but at the same time found that the English company purchased with knowledge of the pending suit of Maupin, and in equity should pay the Maupin judgment, and that Reinhard should be substituted to the rights of Maupin to the extent of the amount paid by him for the land at the sheriff's sale. The court accordingly decreed a lien in favor of defendants for one hundred and forty dollars. The defendants only appealed from this decree.

The record discloses these further facts: The articles of association of the Missouri company provide for three directors, and the place of business is therein stated to be the town of St. Clair, Franklin county, Missouri. This company expended some seventy thousand dollars in the purchase of the land and in the development of the mine. It became financially embarrassed in an unsuccessful effort to obtain lead in paying quantities. To place it in a position to pay its debts and prosecute the enterprise a meeting was held by Nathaniel Sands, Francis A. Sands, and George Hopkins in London, England, on the 8th of April, 1879. At that time Nathaniel Sands resided in St. Louis in this state, and Francis A. Sands and George Hopkins resided in England. Nathaniel Sands and Francis A. Sands were the directors of the Missouri company, and they then and there elected Hopkins as a director. These three persons held and owned all of the stock of the Missouri company, and the company was indebted to Hopkins for advances made by him. These persons, as directors, then made a contract with a trustee whereby the trustee undertook to organize a corporation with

a capital stock of ninety thousand pounds, to be divided into nine thousand shares of ten pounds each, four thousand five hundred to be A or preferred shares, and four thousand five hundred to be B or ordinary shares.

By the same contract the Missouri company agreed to convey its property to the English company for the consideration of sixty thousand pounds, to be paid in money and stock of the new company. The English company was then duly organized, and the Missouri company, by its president, executed and delivered the deed dated the 12th of January, 1880. The deed recites a consideration paid of sixty thousand pounds, five thousand pounds in cash, ten thousand pounds in A shares, and four thousand five hundred B shares, all paid up. As we understand the transaction the stockholders of the Missouri company received the five thousand pounds in money, and the one thousand A and the four thousand five hundred B shares for the money paid and advanced by them in the purchase and development of the mining property. In other words they received this consideration for their interests in the Missouri company. Various other persons subscribed for stock in the new company, and by the sale of such stock the new company raised about one hundred thousand dollars, all of which was expended in the further development of the mine between 1880 and 1885. The debts of the Missouri company were all paid save this contested claim of Maupin.

1. The defendants insist that the deed from the Missouri company to the English company is void because executed and delivered in England.

As our statute provides that the articles of association shall state the city or town and the county in which the corporation is to be located, it is but fair and reasonable that acts of the body corporate itself, such as annual elections of directors, votes to increase or diminish the stock, and other meetings of the stockholders, should take place at the home office. But where, as here, there is no prohibitory statute, and all of the shareholders give their consent, the acts of the stockholders at a meeting held in a foreign jurisdiction are valid: 1 Morawetz on Private Corporations, 2d ed., sec. 484; Taylor on Corporations, 2d ed., sec. 382. Directors are the agents of the corporation, and it is now quite well settled that they may hold meetings and transact business in a foreign state if they desire to do so unless the contrary is expressly provided by

the charter, by-laws, or the general laws of the state under which the corporation was organized: Morawetz on Private Corporations, 2d ed., sec. 533; Taylor on Corporations, 2d ed., sec. 381; *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 86 Am. Dec. 128; *Handley v. Stutz*, 139 U. S. 422.) These three persons who transacted the business in London held all of the stock, and were the duly appointed directors. The law of this state did not prohibit them from holding meetings there, and it follows that the action of these directors in making the contract for the sale of the property, and in directing the president to execute the deed, and his act in executing and delivering it, were and are just as valid as if they had been performed here at the office of the corporation.

2. The further contention that the English company had and has no power to take and hold real property in this state is equally untenable. Though it was said in *Bank of Augusta v. Earle*, 13 Pet. 584, that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty," still it was there held that it did not follow that it could not do business in other jurisdictions. Though corporations are mere artificial beings and creatures of the law where organized, still, it is settled beyond a shadow of doubt that they may hold property and transact business in a foreign state or country, when not prohibited from doing so by the laws of such country. But wherever a corporation "goes for business it carries its charter, as that is the law of its existence, and the charter is the same abroad as at home": *Canada etc. Ry. Co. v. Gebhard*, 109 U. S. 527.

Now, it is conceded that this company was duly incorporated under the companies' acts of Great Britain, and the proof is clear and undisputed that a corporation may be legally created there, under those acts, with power to purchase and hold real property in other jurisdictions. According to the record before us, there can be no doubt but the laws of that country gave to this corporation the power to purchase, hold, and operate mining lands in this state. There is nothing in the laws of this state denying to it the right to exercise those powers here. On the contrary, our statute laws rather encourage foreign mining corporations to pursue their business here. It follows that this corporation has the right and power to purchase, hold, and operate mining lands in this state.

But it is argued that this corporation is, by the memo-

randum of association, limited to the purchase of lands situate in this state, and as it has no power to purchase and hold mining lands at home, it can have no power to purchase and hold such lands here.

The memorandum of association provides that "the registered office of this company is to be in England," and that the objects for which it is established are: "1. To adopt and carry into effect the agreement of the 8th of April, 1879, before mentioned. 2. To purchase or otherwise acquire and work any mines, minerals and mining rights, lands, hereditaments, and chattels in the state of Missouri, in the United States of America, or elsewhere. 4. To purchase, sell, and deal in lead and lead ores and other metal and metallic ores, and generally to carry on the business of mine-owners and workers of and dealers in the products of mines."

There is no doubt but that this corporation was organized for the primary purpose of purchasing and operating these particular mining lands in this state, but its business in the purchase and operation of mines is not restricted to this state. This is clearly shown by the words, "or elsewhere," meaning elsewhere than in this state. This is the more apparent from the fourth paragraph; for in that no allusion whatever is made to any locality. This company has, we conclude, the power to purchase and operate mining lands in England as well as in this state.

But suppose we are wrong in this, and that, by reason of the language used in the memorandum of association, the company cannot purchase and operate mining lands there, still it does not follow that it cannot purchase and operate such lands here. In *Land Grant Ry. etc. Co. v. Board of Commrs.*, 6 Kan. 255, it was held that a corporation created by the state of Pennsylvania, which could not do business nor have an office in that state, could not do business in the state of Kansas. Speaking of the Kansas case it has been said: "While this doctrine is correct in principle, its application requires much caution. The fact that all the operations of a corporation are carried on outside of the state in which it was incorporated is not necessarily an objection to the legality of these operations. It is only if some rule of law or principle of policy adopted by a state would be interfered with by allowing a foreign corporation to transact business within its jurisdiction that the usual comity will be refused": 2 Morawetz on Private Corporations, 2d ed., sec. 965 a.

This corporation has its registered office in England, and holds its corporate meetings and can transact much of its business there. The fact that some portion of its business, namely, the purchase and operation of mining lands, can be carried on here and here only is immaterial. It has, by the law of the place of its creation, the power to do such business here, and that business is not opposed to the policy of our laws, and we have no statute which denies to it the right to carry on such business here. This corporation, therefore, had and has the right to purchase, hold, and operate these mining lands.

3. The averments in the answer to the effect that this sale of the property of the Missouri company to the English company was a contrivance to cheat and defraud the creditors of the Missouri company stand unproved. On the contrary the circumstances all tend to show that there was no actual fraud in the transaction. The new company was organized and the property of the old turned over to it for the purpose of raising additional capital to prosecute the further development of the mine. That the transaction was made and concluded for this purpose and in good faith cannot be doubted. Nor can it be said that the deed to the new company was voluntary, that is to say, without consideration. It must be remembered that this was something more than a mere reorganization of the old company; for a large number of persons having no interest in that company purchased stock in the new one. Indeed the five thousand pounds cash paid the old company and the one hundred thousand dollars expended at the mine after the date of the deed in question was raised by the sale of stock of the new company. It is true the five thousand pounds and the one thousand A shares and the four thousand five hundred B shares were in the end turned over to the stockholders of the old company; but such money and stock constituted a payment made by the new company. The new company in this way paid the full value of the property purchased and conveyed by the deed.

Had the parties set aside one thousand dollars to meet this judgment rendered five years thereafter, no one could or would question the validity of the transaction. Is the sale to be held fraudulent and void and this vast amount of property sacrificed for one hundred and forty dollars because of a failure to set apart one thousand and nine dollars for the payment of this single contested claim, there being no actual

fraud in the transaction? We say no. The sale must be held to be fraudulent in the sense that it is void at law, before the defendants can have the relief prayed for in their answer. The single circumstance that this contested claim was not provided for, standing alone as it does, is not sufficient proof to warrant or justify the inference that the transaction was made to defraud creditors.

It does not follow from what has been said that this creditor is without remedy. It is a favorite doctrine with the courts of equity that the capital stock and other property of a corporation is to be deemed, as between creditors and stockholders, a trust fund for the payment of the debts; and where such property has been divided among the stockholders, leaving debts unpaid, the stockholders are in equity bound to refund: *Heman v. Britton*, 88 Mo. 549; *Thompson on Liability of Stockholders*, secs. 10, 18. It is quite possible that under the circumstances of this case the creditor could enforce his equitable claim against the new corporation; but the remedy of the creditor against the old stockholders or the new corporation is by bill of equity. The circuit court substituted the defendants to the rights of the creditor to the extent of the amount bid at the sheriff's sale with interest, and this is all the defendants have a right to recover. The defendants have no just ground of complaint against the decree entered in this case, and the judgment is therefore affirmed. All concur.

CORPORATIONS.—THE CAPITAL STOCK IS A TRUST FUND in the hands of its directors or stockholders for the benefit of its creditors: *Commercial Nat. Bank v. Burch*, 141 Ill. 519; 33 Am. St. Rep. 331, and note; *Hoeses v. Northwestern Mfg. Co.*, 48 Minn. 174; 31 Am. St. Rep. 637, and note. The capital stock of a corporation is the basis of its credit: *Marshall Foundry Co. v. Kilian*, 99 N. C. 501; 6 Am. St. Rep. 539, and note.

FOREIGN CORPORATIONS—POWER TO ACQUIRE LAND.—A corporation created in another state can purchase and hold lands in this: *Lumbard v. Aldrich*, 8 N. H. 31; 28 Am. Dec. 381; *Thompson v. Waters*, 25 Mich. 214; 12 Am. Rep. 243, the contrary doctrine is maintained in *Carroll v. East St. Louis*, 67 Ill. 568; 16 Am. Rep. 632, and *United States Trust Co. v. Lee*, 73 Ill. 142; 24 Am. Rep. 236. In Georgia a foreign corporation cannot own more than five thousand acres of land unless it becomes incorporated under the laws of Georgia: *American Mortgage Co. v. Tennille*, 87 Ga. 28. A foreign railway corporation unless it becomes incorporated under the laws of Nebraska is absolutely prohibited from acquiring a right of way in that state: *Koenig v. Chicago etc. R. R. Co.*, 27 Neb. 699. Under the laws of 1887, a foreign corporation purchasing land in Nebraska at a judicial sale holds a valid title as to every one but the state: *Carlow v. Aultman*, 28 Neb. 672. A foreign corporation is entitled to make a mortgage loan in Missouri: *Ferguson v. Seden*, 111 Mo. 208; 23 Am. St. Rep. 512, and note.

CORPORATIONS—CORPORATE MEETING OUT OF STATE OF DOMICILE.—Corporate acts performed by the body of the corporation sitting out of the state creating it are void: *Aspinwall v. Ohio etc. R. R. Co.*, 20 Ind. 492; 83 Am. Dec. 329; *Miller v. Ewer*, 27 Me. 509; 46 Am. Dec. 619, and note. Unless restrained by its charter or by-laws, or by the laws of the state creating it, the directors of a corporation have the power to meet in another state, and their acts at such a meeting are valid: *Thompson v. Natches Water etc. Co.*, 68 Miss. 423.

NATIONAL BANK OF COMMERCE OF KANSAS CITY v. MORRIS.

[114 MISSOURI, 255.]

CHATTEL MORTGAGE—INDEPENDENT CONTRACT—NECESSITY FOR RECORDING.—A receipt taken by the mortgagee and vendor, from the mortgagor and vendee of cattle, which recites that such cattle are subject to a prior mortgage which the vendor will have released, or return the mortgage to the vendee and cancel the sale, but which is not referred to in the mortgage forms no part thereof, and is an independent contract which need not be recorded for the purpose of imparting notice.

CHATTEL MORTGAGE—RECORD AS NOTICE OF INDEPENDENT CONTRACT.—If a contract is referred to in a recorded mortgage all persons claiming under it take with notice of such contract.

CHATTEL MORTGAGE—EXTRATERRITORIAL EFFECT OF RECORD OF.—A chattel mortgage duly executed and recorded in the state where the property is situated imparts notice to an innocent purchaser who buys the property in another state to which it has been removed by the mortgagor, unless the mortgage is opposed to the laws and public policy of the latter state. The fact that the mortgage provides that the mortgagor is to remain in possession of the property until forfeiture for failure to pay the debt upon its maturity makes no difference in such case.

CHATTEL MORTGAGE—BREACH OF CONDITION BY REMOVAL OF PROPERTY.—One is guilty of a conversion of mortgaged chattels, if he removes and sells them, the mortgage giving the mortgagee the right to take possession of the property upon its removal or sale.

John C. Orrick and Horton Pope, for the appellant.

Boyle and Adams, and H. M. Pollard, for the respondents.

BURGESS, J. This is an action in trover and conversion for five hundred and seventy head of cattle. The plaintiff claims to have been the owner of the cattle as assignee of a mortgage executed in the state of Kansas on the cattle on the twenty-second day of October, 1890, by B. A. Webber and W. D. Wilson, to G. A. Dunn to secure the payment of their note for fifteen thousand six hundred and seventy-five dollars, payable ten months after the date of the mortgage.

The law of Kansas in relation to chattel mortgages which was in force at the time of the execution of the mortgage under which plaintiff claimed the cattle is as follows:

"SECTION 9. Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged shall be absolutely void, . . . as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated; or, if the mortgagor be a resident of this state, then of the county of which he shall at the time be a resident.

"SEC. 10. Upon the receipt of any such instrument the register shall indorse on the back thereof the time of receiving it, and shall file the same in his office, to be kept there for the inspection of all persons interested."

"SEC. 15. In the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession."

A copy of the mortgage was, prior to the thirtieth day of November, 1890, deposited in the office of the register of deeds of Edwards county, Kansas, the place of residence of W. D. Wilson, and in the office of the register of deeds for Stafford county, the place of residence of B. A. Webber. The mortgage deed, among other things, provided that possession of the cattle was to remain with the mortgagors until default in payment of the debt or interest, or "in case of sale or disposition, or attempt to sell or dispose of the same, or removal or attempt to remove the same," from certain counties in Kansas enumerated in the mortgage, when the mortgagee might take the property into his own possession. Before the maturity of the mortgage debt, the mortgagors, without the knowledge or consent of the mortgagee or his transferee, removed the cattle to the state of Illinois, and sold them to respondents through commission men. It is conceded that respondents had no actual notice of the mortgage, and paid value for the cattle, and that the mortgage deed was not recorded in the state of Illinois. The identity of the cattle is not disputed.

The answer is first a general denial, and then alleges that defendants were innocent purchasers for value, and contains

other allegations, which so far as deemed material will be referred to in this opinion.

The court below sustained a demurrer to the evidence introduced by plaintiff, and directed a verdict for defendants, on the grounds that the mortgage had not been recorded in or executed as required by the laws of Illinois, and that the defendants were innocent purchasers. After filing the usual motion for a new trial, and the same being overruled, plaintiff prosecutes its appeal to this court.

This is a case where one of two innocent parties must suffer loss, as there seems to have been the utmost good faith throughout the entire transaction so far as the plaintiff and defendant themselves are concerned. In fact, there is no intimation by either party to the contrary. The defendants purchased the cattle in open market in the city of East St. Louis, Illinois, a large cattle market, where many are sold, and paid full value therefor. And if the old English doctrine in regard to markets overt was applicable in this case, they would evidently be protected in their purchase, and could not be held liable in this action for the value of the cattle in controversy. This is so, even though the vendor, or person claiming to be the owner and in possession, was not in fact the owner. But it is said in the case of *Ventress v. Smith*, 10 Pet. 175, that the doctrine of markets overt which controls and interferes with the application of the common law has never been recognized in any of the United States, or received any judicial sanction: *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278. The general rule is that no man can acquire title to chattels from a person who has himself no title to them: *Wheelwright v. Depeyster*, 1 Johns. 478; 3 Am. Dec. 845. The only exception being sales of cash and certain negotiable instruments. The purchaser must know that the person from whom he buys is the owner of the property.

At the time of the execution of the mortgage under which plaintiff claims the cattle, Dunn, the mortgagee, executed and delivered to Webber and Wilson a receipt as follows:

"Received of B. A. Webber and W. D. Wilson, one note of \$15,675, secured by chattel mortgage on five hundred and seventy head of three and four year old steers, under the following conditions: "Whereas, I have this day sold the above-described property to said Webber and Wilson, and, whereas, there is now a chattel mortgage thereon given by G. A. Dunn & Co. to the Bank of Commerce of Kansas City, Missouri, for the

sum of \$15,000, which I agree to have released on or before the first day of November, 1890; otherwise I agree to return the above-mentioned note and mortgage to said Webber and Wilson, and the said sale is to be declared off without liability to either party. [SIGNED] G. A. DUNN."

The conditions of this receipt were never complied with by Dunn nor was it ever recorded, and defendant's counsel contend that as it was the counterpart of the mortgage and was not recorded with it, that the recording of the mortgage without it was not a compliance with the registry act of Kansas, and was not notice. This receipt is not referred to in the mortgage, is not made part thereof, and it is somewhat difficult to see how it became a part thereof so as to entitle it to record as its counterpart. It seems to be a separate and independent paper. Not only this, but Webber and Wilson did not seek to avoid their contract of purchase of the cattle because the stipulation in the receipt had not been complied with by Dunn. On the contrary, they kept the cattle, and by their act in selling them through their agents to defendants affirmed the contract of sale, and defendants buying from them occupy no better position than they did unless they were innocent purchasers.

There is no question and there can be none as shown by the authorities cited by counsel that where a paper, contract or agreement is referred to in a mortgage, that all persons claiming under such mortgage where it has been duly recorded take with notice of the paper, contract or agreement referred to: *Munson v. Ensor*, 94 Mo. 504; *Brownlee v. Arnold*, 60 Mo. 79; *Lewis v. Penn Mut. L. Ins. Co.*, 3 Mo. App. 372; *Missouri Pac. Ry. Co. v. Atkison*, 17 Mo. App. 484. Still it is not necessary for that reason that such paper or contract should be recorded. The law of Kansas only required the mortgage or copy thereof to be filed for record in the counties where the mortgagees, Webber and Wilson, resided at the time, which appears from the evidence to have been done: General Statutes, state of Kansas, art. 2, c. 68.

The mortgage was duly executed and recorded in the state of Kansas, and all persons thereafter purchasing the cattle within the borders of that state were bound in law to take notice thereof, and the same rule by virtue of comity between the states applied to the cattle in the state of Illinois when they were shipped into that state. In the case of *Smith v. Hutchings*, 30 Mo. 380, where a slave on whom a mortgage

had been duly executed and recorded in Kentucky where she then was and where the mortgagor resided, was afterwards brought to this state, where the mortgage was not recorded, and sold, the court held, that the mortgage being good where it was made it was good everywhere else on every principle of international comity, unless the policy of the state from which the property is brought, and where the controversy arises, should induce a different rule. In the case of *Feurt v. Rowell*, 62 Mo. 524, the court says, "The mortgage was recorded in the county in which the mortgagor resided, and imparted full notice to everyone, who was or might become interested. The removal of the property to another county did not destroy the lien. Had the property been removed out of the state, the mortgage would not thereby have been invalidated." In the case of *Lafayette Co. Bank v. Metcalf*, 29 Mo. App. 384, the Kansas City court of appeals held, that where a mortgage had been duly executed on some cattle in Lafayette county and recorded therein, and the cattle were thereafter shipped by the mortgagor to the defendants, who were commission merchants in East St. Louis in the state of Illinois, and sold by them on commission, that they were liable to plaintiff as beneficiary in the mortgage for the value of the cattle, and that defendants were to be treated the same as if they knew of the execution of the mortgage, and that the mortgage being good as between the parties, and binding on all persons in the state where it was executed and recorded, was by the rule of comity valid and binding, and pursued the property outside of the state where the plaintiffs might have followed it with their mortgage: *Rice v. Brown*, 9 Cush. 309; *Lafayette Co. Bank v. Metcalf*, 40 Mo. App. 501. The same rule applies in Illinois where the cattle were sold: *Phinney v. Baldwin*, 16 Ill. 108; 61 Am. Dec. 62; *Smith v. Whitaker*, 23 Ill. 367; *Mumford v. Canty*, 50 Ill. 371; 99 Am. Dec. 525; *Roundtree v. Baker*, 52 Ill. 241; 4 Am. Rep. 597; also in Kansas, *Ramsey v. Glenn*, 33 Kan. 271; *Brown v. James H. Campbell Co.*, 44 Kan. 237; 21 Am. St. Rep. 274; *Handley v. Harris*, 48 Kan. 606; 30 Am. St. Rep. 322; *Ord Nat. Bank v. Massey*, 48 Kan. 762.

The mortgage being good in Kansas is to be given the same force and effect everywhere else upon the principle of international comity, unless the policy of the state of Illinois where the property was taken and where the controversy arose should

evidence a different rule. There is no substantial difference in the legal effect of a mortgage executed and recorded in the state of Kansas, according to the laws of that state, and a mortgage executed and recorded in the state of Illinois according to the laws of that state. There is some difference in the forms and certificates of acknowledgments, it is true, but that in no way affects the validity of the instruments, or the rights of parties holding under them.

It is argued that because the mortgage provided that the mortgagors, Webber and Wilson, were to remain in the possession of the cattle until forfeiture for failure to pay the debt when it became due, it gave them a badge or *indicia* of ownership, which permitted them to impose upon innocent purchasers, and that for that reason defendants have the superior equity. This provision is expressly authorized by the law of the state where the contract was made, and also by the law of the state where the cattle were sold. It is difficult to see in what way a mortgage would benefit a debtor if at the very moment it was executed the mortgagees were by its provisions authorized to take possession of the mortgaged property. It would be better to deliver it at once to the creditor without the expense and trouble of executing the mortgage. The object of the mortgage is to give time to the debtor and to enable him to pay his demand by securing his creditor, otherwise it would be a useless instrument and not worth the paper upon which it is written. We do not wish to be understood as saying that the plaintiff has any superior equities over the defendants, but we do say that having complied with the law of the state in regard to such instruments where the mortgage has been executed and recorded, that by comity between the states the plaintiff holding under the mortgage has the superior legal right, and when defendants purchased the cattle it was their duty to see that the vendor was the owner and had right to sell the same. It is not opposed to the policy of the state of Illinois to enforce contracts made in another state when they are not based upon an immoral or criminal consideration: *Mumford v. Cauty*, 50 Ill. 871; 99 Am. Dec. 525.

At the time that this suit was brought the mortgage debt was not due, and it is claimed that for that reason this action was prematurely brought, and that no cause of action had then accrued to plaintiffs. The mortgage provides "that in case of a sale or disposal or attempt to sell or dispose of the

property or a removal or attempt to remove the same from Stafford and Edwards counties, or any unreasonable depreciation in the value, or if from any other cause the security shall become inadequate, or if at any time the party of the second part shall deem himself insecure, the said party of the second part may take such property or any part thereof into his possession." The possession at the time of the conversion was in the mortgagors. It is a well-settled rule of law that the mortgagors under such circumstances have the title to the property; and having the possession, they have an interest they may sell, and may transfer the possession to the vendee, subject, of course, to the lien of the mortgage. Plaintiff relies for support of the action upon the provision of the mortgage which authorized the mortgagee to take possession of the property in case the mortgagors attempted to sell, dispose of or remove the cattle. This is an option which he may or may not exercise. Authorities of high character, including those cited by counsel for defendants, hold that until such option is exercised by the mortgagee and he either so takes or demands the possession, the possession remains with the mortgagor until default made in the payment of the debt, and that a sale made by him before such default or assertion of right will not support trover against the vendee or agent making the sale: *Lafayette Co. Bank v. Metcalf*, 29 Mo. App. 392; *Skiff v. Solace*, 23 Vt. 279; *Hathaway v. Brayman*, 42 N. Y. 325, 1 Am. Rep. 524; *Hamill v. Gillespie*, 48 N. Y. 556; *Cadwell v. Pray*, 41 Mich. 307.

By the terms of the mortgage the mortgagee was secured the right to take possession of the property upon the contingency of its removal or sale before the maturity of the debt. Whenever then the property was removed and sold, it was a conversion, and a right of action accrued to the mortgagee, and he was not obliged to wait until the note matured before bringing his suit. Whatever may be the rule in other jurisdictions, in this state the law seems to be as herein indicated: *Lafayette Co. Bank v. Metcalf*, 29 Mo. App. 393; *Williams v. Wall*, 60 Mo. 321; *Koch v. Branch*, 44 Mo. 542; 100 Am. Dec. 824.

No question as to want of demand before suit brought is made in this case, but even that was not necessary before bringing suit: *Lafayette Co. Bank v. Metcalf*, 29 Mo. App. 384.

The judgment is reversed and the cause remanded.

All of this division concur.

CHATTEL MORTGAGES—EXTRATERRITORIAL EFFECT OF.—A chattel mortgage, duly executed and recorded in the state where the property is situated, may be enforced against an innocent purchaser in the state to which it has been removed: *Handley v. Harris*, 48 Kan. 606; 30 Am. St. Rep. 322, and note; note to *Brown v. Campbell*, 21 Am. St. Rep. 282. In *Corbett v. Littlefield*, 84 Mich. 30, 22 Am. St. Rep. 681, it was held that the recording of a chattel mortgage in one state has no extraterritorial force in another state as notice of a lien.

CHATTEL MORTGAGES—CONVERSION OF MORTGAGED PROPERTY: See extended note to *Hale v. Ames*, 15 Am. Dec. 153; note to *Jones v. Horn*, 14 Am. St. Rep. 19, and *Brown v. Campbell*, 44 Kan. 237; 21 Am. St. Rep. 274.

RECORD—NOTICE OF LIENS AND EQUITIES SHOWN BY.—Purchasers of land are deemed to have notice of every fact disclosed by the record: *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826, and note; *Stewart v. Matheny*, 66 Miss. 21; 14 Am. St. Rep. 538, and note. See the extended notes to the following cases: *Lodge v. Simonton*, 23 Am. Dec. 48, and *Parker v. Conner*, 45 Am. Rep. 184.

KLEIMANN v. GIESELMANN.

[114 MISSOURI, 487.]

EVIDENCE.—CERTIFIED COPY OF A DEED OF TRUST is admissible in evidence when the proof is sufficient to satisfy the mind of the trial court that the original is lost, and that it cannot be found after search made at the proper place.

PRACTICE.—IRRELEVANT EVIDENCE ADMITTED IN AN EQUITY CASE will be disregarded by the supreme court on appeal.

SUBROGATION—VOLUNTARY PAYMENT.—One who has no interest in land subject to a mortgage, and who advances money to the mortgagor with which the mortgage debt is satisfied, is a mere volunteer, not entitled to be subrogated to the rights of the mortgagee.

HOMESTEAD—FATHER'S RIGHT TO ALIENATE BY WILL.—A father cannot, by will, deprive his minor children of their homestead rights in property occupied by them as a homestead at the time of his death.

MISTAKE OF LAW—RELIEF.—Mere ignorance or mistake of law on the part of a party to a contract will not authorize a court of equity to set it aside.

SUBROGATION—VOLUNTARY PAYMENT BY MISTAKE OF LAW.—If a mortgagor and mortgagee of a homestead mortgaged for money with which to pay off a prior mortgage labor under a mutual mistake in supposing that the homestead belongs to the mortgagor in fee, under her husband's will, to the exclusion of her minor children, equity will not grant relief by subrogating such mortgagee to the rights of the prior mortgagee.

James Carr, for the appellants.

Lubke and Muench, for the respondent.

BURGESS, J. This suit was instituted in the circuit court of the city of St. Louis, where it resulted in a judgment for defendants, from which plaintiff appealed to the St. Louis

court of appeals, by which court the decision of the circuit court was reversed. The cause was certified to this court by the court of appeals, on the ground that the decision rendered therein by that court is, in the opinion of one of the judges, in conflict with the decision of this court in the case of *Griffith v. Townley*, 69 Mo. 13; 33 Am. Rep. 476.

The questions presented by the record in this case are sufficiently stated by Judge Rombauer (*Kleimann v. Geiselmann*, 45 Mo. App. 497), which are as follows:

"The object of the petition is to obtain a decree declaring that a certain deed of trust executed by John H. Gieselmann is a subsisting lien on certain real estate, and that the plaintiff is the owner of the lien, and to foreclose the lien in this proceeding. The petition states that this deed of trust was executed by Gieselmann to secure the payment of a note of fifteen hundred dollars to one Reinhardt; that the said Geiselmann afterwards died, leaving Anna Gieselmann, his widow, and the other defendants, his children and heirs at law, and leaving also a last will, duly probated on September 9, 1882, whereby he bequeathed the property in question to his said widow and to the heirs of her body forever; that at the time of his death said Gieselmann occupied a part of the buildings on the land as a homestead, the residue being occupied by his tenants; that the debt and interest, amounting to sixteen hundred dollars, remained unpaid on or about January 5, 1884, and said Reinhardt threatened, and was entitled, to foreclose the deed of trust unless his debt be secured to him, and the defendant, Anna Gieselmann, being executrix of the mortgagor's last will, and representing herself to one Fredericka Werk as the devisee in fee of the equity of redemption in said real estate, fully empowered to pass and grant title to the fee in said property, and to renew said mortgage, and to keep the lien thereof in force and effect, applied to said Fredericka Werk to pay and furnish to Reinhardt the amount of the mortgage debt, and caused her to believe that upon her furnishing such money said deed of trust could and would be kept alive by a new mortgage of said Anna Gieselmann alone.

"That, relying upon and believing such representations, said Fredericka Werk, without intention on part of herself or Mrs. Gieselmann to release, arrest, or defeat the lien of the deed of trust, furnished the sum of sixteen hundred dollars then due to Reinhardt, and thereupon received another and new deed of trust executed by Mrs. Gieselmann, extending

such debt for two years, but without releasing the original deed of trust.

“That this new deed of trust was executed for the sole benefit of the widow and heirs of John Gieselmann, deceased, with the intent of all parties thereto to merely keep and enforce, continue and extend the debt and lien on the old deed, and of keeping the equity of redemption therein from being foreclosed and lost.

“That on April 30, 1888, the secured debt remaining still unpaid, Mrs. Fredericka Werk caused the property to be advertised and sold pursuant to power of sale given, became the purchaser at the sale, had title conveyed to her by the trustee, and said Anna Gieselmann thereupon attorned and delivered possession to her.

“Thereafter, on January 9, 1889, in payment of a just debt, Fredericka Werk conveyed the property to respondent Kleimann, thereby transferring to him all this interest in the property, as also all right and equity to subrogation to such mortgage, so that respondent is now vested with all rights respecting the same theretofore existing in said Werk.

“That owing to a right of homestead in defendants and for lack of power in Anna Gieselmann to convey as great an estate as had been vested in the deceased Gieselmann, this new deed of trust failed to express the intent of the parties thereto and did not, and should not, extinguish or satisfy the first mortgage; but, by reason of the premises, plaintiff should be subrogated and substituted to all rights held by Reinhardt in the first mortgage before January 5, 1884, and the debt secured by the same should be foreclosed unless redeemed by the Gieselmanna.

“The prayer was for a foreclosure of the original deed of trust unless paid off and for general relief.

“The answer in the case by Mrs. Gieselmann and her children was a general denial.

“The court, upon the hearing, made an interlocutory decree to the effect that the plaintiff as assignee of Mrs. Werk was entitled to be subrogated to the rights of Reinhardt under the first deed of trust, ordered the surrender of the second note and deed of trust to Mrs. Gieselmann and sent the case to a referee to take an account of moneys due under the first deed of trust. Upon the referee's report coming in, the court made a final decree, finding that the sum of two thousand two hundred and thirty-four dollars and forty-seven cents was due

under the first deed of trust, and ordering its foreclosure by sale unless the defendant redeemed the property by payment of that sum with interest. From this decree the defendants appeal, assigning for error the ruling of the court upon the evidence, and that the decree is not supported by the evidence and is against the great weight of the evidence.

"The court, upon the hearing, permitted the plaintiff to read a certified copy of the first deed of trust. It is claimed by defendants that this was error, as the loss of the original was not accounted for. All the evidence concurred that the original was left with the justice who prepared the second deed, and could not now be found by him, although he had made diligent search for it."

The rule is, in questions of this character, that the trial judge is to determine the sufficiency of the proof. Under the facts and circumstances developed in the case if they are sufficient to reasonably satisfy the mind of the court that the original is lost and that it cannot be found after search made at the proper place, that is all that is necessary. "The object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and this is a preliminary inquiry addressed to the discretion of the judge": 1 Greenleaf on Evidence, 14th ed., sec. 558, p. 118, note b; *Christy v. Kavanaugh*, 45 Mo. 375; *McConey v. Wallace*, 22 Mo. App. 377. We hold that the court did not err in permitting plaintiffs to read a certified copy of the original deed of trust in evidence.

But even if the court did admit irrelevant evidence, the case being one in equity, and the trial before the court without the aid of a jury, the case should not be reversed on that ground, as such evidence will be disregarded by this court in determining the facts involved.

Mrs. Werk testified that she loaned to Mrs. Anna Gieselmann, defendant, sixteen hundred dollars to pay a debt owed by her deceased husband to Augustus Reinhardt, which was secured by deed of trust on the property in controversy, and that when she made the loan Mrs. Gieselmann stated to her that, "you make me the loan and you can have the trust deed which Reinhardt holds against the property," in controversy. That when she paid the money, Justice Noche, by whom a new note and deed of trust to secure the payment of the same was drawn up and executed by Mrs. Gieselmann on the same property, said "here are the Reinhardt papers, and everything is all right." She did not take

the Reinhardt papers, and never had them in her possession; but she did take the new note and deed of trust and kept them for over four years before she says she found out that they were not the right papers, and that the papers that she was to have were the original note and deed of trust. Mrs. Gieselmann and her daughter Anna both testified that Mrs. Werk positively refused to accept or to have anything to do with the Reinhardt papers, but insisted all the time that she must have a new note and deed of trust executed by Mrs. Gieselmann in whom they both believed that the title to the property was vested in fee by virtue of the will of Mrs. Gieselmann's deceased husband. There is no question but that both Mrs. Werk and Mrs. Gieselmann believed the title to be in Mrs. Gieselmann. When the fact that Mrs. Werk never had the original note and deed of trust in her possession is taken into consideration in connection with the testimony of Mrs. Gieselmann and her daughter, it seems to show conclusively that the idea of claiming that she was paying off, and that she was to have the benefit of the first note and deed of trust, was an afterthought, and that she did not reach that conclusion until after she had learned that the last note and deed of trust which she had taken was of doubtful security because of the homestead rights of the children of Gieselmann, deceased, in the property, while the first was absolutely safe and free from any conflicting interests. The payment then of the original note was merely voluntary on her part, and she is not entitled to be subrogated to the rights of Reinhardt: *Evans v. Halleck*, 83 Mo., 376; *Wooldridge v. Scott*, 69 Mo. 669; *Wade v. Beldmeir*, 40 Mo. 486.

The husband and father could not by will deprive his minor children of their homestead rights in the property in controversy, which was occupied by all of them as a homestead at the time of his death: *Rockhey v. Rockhey*, 97 Mo. 76; Revised Statutes, 1889, sec. 5439; *Kass v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767.

Granting that there was a mutual mistake between Mrs. Werk and Mrs. Gieselmann as to the interest acquired by the latter to the property under the will of her deceased husband and right to convey the same, as she intended to do, it was merely a mistake of law against which a court of equity will not grant relief. In the case of *Dailey v. Jessup*, 72 Mo. 145, this court says: "It is unnecessary to cite authorities in support of the proposition that mere ignorance of the law on the

part of a party to a contract will not authorize a court of equity to set aside the contract. There must be something more. The circumstances attending the making of the contract must be such as to excite 'suspicions of fraud, imposition, misrepresentation or undue influence on one side and imbecility, credulity or blind confidence on the other': *Faust v. Birner*, 30 Mo. 414; *Griffith v. Townley*, 69 Mo. 13; 33 Am. Rep. 476." The present case is entirely free from fraud or deceit, and the evidence shows that the parties acted in the utmost good faith.

Mrs. Gieselmann could not have corrected the mistake herself if she had been so inclined, because after the first note was paid off the interest of the minor children in the homestead was discharged from the first mortgage, and was superior to the second and could not in any way have been disposed of or encumbered by any act or deed of hers: *Anglade v. St. Avit*, 67 Mo. 434.

The case at bar is unlike the case of *Griffith v. Townley*, 69 Mo. 13; 33 Am. Rep. 476. That case was founded on mutual mistake of fact as well as of law in regard to a claim against the estate wherein the administrator having full power and control over its personal effects and assets was a party, while the case at bar is one where one of the contracting parties, Mrs. Gieselmann, only has an interest in common with the children of her deceased husband in the homestead of which he died seised and no control whatever over the interest of her cotenants. We do not therefore think the views therein expressed are in conflict with this opinion.

The opinion of Rombauer, P. J., in this case, when before the court of appeals, and which is reported in 45 Mo. App. 497, with the authorities cited by him, is convincing and conclusive and is adopted as the opinion of this court.

The judgment of the court of appeals is affirmed, and that of the circuit court of the city of St. Louis reversed and cause remanded to court of appeals.

All the judges of this division concur.

MISTAKE OF LAW—RELIEF AGAINST IN EQUITY.—Equity will not allow a defense, or grant a reformation or rescission of a contract because one of the parties may have misconceived its legal effect: *Renard v. Clink*, 91 Mich. 1; 30 Am. St. Rep. 453, and note; note to *Berry v. American etc. Ins. Co.*, 28 Am. St. Rep. 554. If nothing more than a bare mistake of law can be shown, equity will rarely, if ever, grant relief: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63, and

note. See also the extended notes to *Lawrence v. Beaubien*, 23 Am. Dec. 164, and *Black v. Ward*, 15 Am. Rep. 171.

SUBROGATION—A MERE VOLUNTEER IS NOT ENTITLED TO: *Ex parte Hardin*, 34 S. C. 377; 27 Am. St. Rep. 820, and note; notes to *Regan v. New York etc. R. R. Co.*, 25 Am. St. Rep. 320; and *Backer v. Pyne*, 30 Am. St. Rep. 236, 237.

EVIDENCE—CERTIFIED COPIES OF DEEDS, WHEN ADMISSIBLE AS.—A certified copy of a deed is admissible as evidence where the original is lost and cannot be found, or where it is not in the power of the party offering the copy: *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103, and note; *Barton v. Murrain*, 27 Mo. 235; 72 Am. Dec. 259, and note; *Butler v. Brown*, 77 Tex. 342; *Blalock v. Miland*, 87 Ga. 573; *Collins v. Ball*, 82 Tex. 259; 27 Am. St. Rep. 877, and note. See also the note to *Scanlan v. Wright*, 25 Am. Dec. 349.

HOMESTEAD—POWER OF FATHER OR HUSBAND TO ALIENATE BY WILL.—A husband and father cannot by will deprive his widow or minor children of their homestead right: *Hatch's Estate*, 62 Vt. 300; 22 Am. St. Rep. 109; *Kaes v. Gross*, 92 Mo. 647; 1 Am. St. Rep. 767. See also *Hendrix v. Seaborn*, 25 S. C. 481; 60 Am. Rep. 520.

DUGAN CUT STONE COMPANY v. GRAY.

[114 MISSOURI, 497.]

MECHANIC'S LIEN FOR SIDEWALK AND AREA PARTLY ON LOT.—A mechanic's lien will attach to a lot and building thereon for stone used in the construction of sidewalks and areas, a part of which are on the lot and a part on the street, and all of which are built under one contract.

MECHANIC LIEN LAWS—CONSTRUCTION.—Statutes giving liens for material used in making improvements upon land are remedial in their nature, and should be given a liberal construction.

MECHANIC'S LIEN FOR SIDEWALK.—A sidewalk erected in the street in front of a private building is an improvement and an appurtenance thereto, for which a mechanic's lien will attach to the building and the land upon which it stands.

Lathrop, Smith, and Morrow, for the appellant.

Brown, Chapman, and Brown, for the respondent.

MACFARLANE, J. This is a suit to enforce a mechanic's lien against a lot and building thereon for stone furnished for and used in the construction of a sidewalk, laid partly upon the street adjoining the building and partly upon the lot. The circuit court denied the right to a lien, and gave judgment for defendant, and plaintiff appealed to the Kansas City court of appeals, from which the case was transferred to this court. The requirements of the statutes necessary for securing the lien were all complied with, and the sole question is, whether plaintiff is entitled to a lien upon the lot under the circumstances.

The St. Louis court of appeals has held that a materialman is entitled to a lien upon the adjoining lot for illuminating tiling placed over areas under a sidewalk for the purpose of lighting such areas, though such tiling extended into the street: *Pullis v. Hoffman*, 28 Mo. App. 666.

In the recent case of *McDermott v. Claas*, 104 Mo. 14, this court, approving the decision of *Pullis v. Hoffman*, 28 Mo. App. 666, held that the materials for a brick sidewalk laid on the street adjacent to and along the building, and purchased under an entire contract for the construction of both the building and sidewalk, was lienable.

It was held by the supreme judicial court of Massachusetts that a drain pipe extending from the cellar of a house in a city through the cellar wall, yard, and street into a sewer, and included in the contract for building the house, which is fitted for the use of the city water, is a part of the house for the laying of which a lien, under the statutes, may be enforced; and it was immaterial that the fee of the street is not in the owner of the house: *Beatty v. Parker*, 141 Mass. 523. The decision was put, not so much upon the fact that laying the pipe was included in the contract to build the house, as that "the house would be incomplete and unfinished without the pipe, and it would pass by a deed of the house as a part of it."

It has also been held by this court that where "walks and fences are constructed under one entire contract, the mechanic has a lien for the labor and materials expended on them": *Henry v. Plitt*, 84 Mo. 237.

Following out these decisions, the conclusion is necessarily reached that this plaintiff was entitled to a lien upon the lot for the stone used in the construction of these sidewalks and areas, a part of which was on the lot and a part on the street, and all of which were built under one contract.

The statute gives a lien for materials used for making any improvements upon land, which lien extends to such improvement and the lot or land upon which the same is made. These statutes are remedial in their nature, and should be given a liberal construction so as to carry out their just and beneficent objects: *De Witt v. Smith*, 63 Mo. 266.

A sidewalk upon a street adjoining a lot and building, in a town or city, is essential to the convenient and comfortable use of the premises. While the walk is on the public street and is open to the general use of the public, it is appurtenant

to the lot, and the owner has in it a special interest which the public does not enjoy. Under a New York statute giving a lien upon the lot, building, and appurtenances, it was held that the word "appurtenances" covered the making of a sidewalk in front of the premises. It was said by Andrews, J.: "The owner of a lot abutting on an avenue or street has an interest therein in common with the public at large, but also a special and peculiar interest, and we think it may be fairly held that a sidewalk in front of a building is an appurtenance thereto within the meaning of the lien law": *Kenney v. Apgar*, 93 N. Y. 549.

While less than one-tenth of the stone furnished by plaintiff was laid upon the lot itself, such part was intended for, and was in fact used to make, an improvement upon the lot, and was therefore lienable: *Henry v. Plitt*, 84 Mo. 237.

As has been seen, the stone used in constructing the sidewalk upon the street adjoining the lot was an improvement of the lot, and, though not placed upon it, was appurtenant to it. The material for the whole improvement then, having been purchased under one entire contract, and having been put upon the lot and the adjoining street, was for an improvement upon the lot within the true spirit and meaning of the statute.

The judgment of the Kansas City court of appeals is reversed, and case is remanded to that court with directions to reverse the judgment of the circuit court and to direct that court to enter a judgment for plaintiff according to the prayer of its petition.

All concur.

MECHANIC'S LIEN FOR SIDEWALK AND STREET IMPROVEMENTS.—A mechanic's lien for constructing a sidewalk in front of a lot is not enforceable against such lot under the Iowa Code: *Coenen v. Staub*, 74 Iowa, 32; 7 Am. St. Rep. 470, and note. In *McDermott v. Claas*, 104 Mo. 14, it was held that where fences and sidewalks were constructed under one entire contract for the erection of a building, the mechanic has a lien for the labor and materials expended on them. A person employed to grade, fill, or otherwise improve a lot in an incorporated city has a lien for his work: *Pils v. Killingsworth*, 20 Or. 432, but as to the latter point, see *Pratt v. Duncan*, 36 Minn. 545; 1 Am. St. Rep. 697, and note.

MECHANIC'S LIEN—STATUTES HOW CONSTRUED.—The statute giving mechanics and material-men liens upon buildings for labor and materials for the construction or improvement thereof is remedial, and should be liberally construed: *White Lake Lumber Co. v. Russell*, 22 Neb. 126; 3 Am. St. Rep. 262; *Steger v. Arctic Refrigerating Co.*, 89 Tenn. 453; notes to *Harrison v. Homeopathic Assn.*, 19 Am. St. Rep. 717, and *Wilcox v. Woodruff*, 29 Am. St. Rep. 231.

MERCHANTS' NATIONAL BANK OF KANSAS CITY v. LOVITT.

[114 MISSOURI, 519.]

PRINCIPAL AND AGENT—NOTICE TO AGENT WHEN NOTICE TO PRINCIPAL.

The rule that notice acquired by an agent while transacting the business of his principal is notice to the latter applies as well to banking and other corporations as to individuals, but when the agent acts for himself and not for his principal the rule does not apply.

BANKS AND BANKING—OFFICER TRANSACTING BUSINESS AT HIS OWN

BANK.—A person has a perfect right to transact his own business at the bank of which he is an officer, and in such transaction his interest is adverse to the bank and he represents himself and not it.

CORPORATIONS—NOTICE TO OFFICER.—When an officer of a corporation is

dealing with it in his individual capacity and interest, the corporation is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the property which is the subject of the transaction.

BANKS AND BANKING—TRANSACTION BETWEEN BANK AND ITS OFFICER

—**NOTICE TO OFFICER AS NOTICE TO BANK.**—When a vice-president of a bank offers it a note of which he is the owner for discount, and the bank discounts the note, placing the amount thereof to his credit without knowledge on the part of the bank president or of any of its other officers of facts affecting the consideration for the note, the bank is not chargeable with notice of such uncommunicated facts affecting the title to the note and rendering it invalid.

Beebe and Watson, for the appellant.

Gage, Ladd, and Small, for the respondent.

BLACK, P. J. This is an action on a negotiable promissory note for two thousand nine hundred dollars, executed by the defendant Lovitt and payable to O. P. Dickinson in four months after date, with interest from date at the rate of eight per cent per annum, and by Dickinson indorsed and delivered to the plaintiff bank. The defense set up by Lovitt, the maker of the note, is a failure of consideration.

The history of the transaction is this: On the 27th of January, 1888, Dickinson, the payee of the note in suit, by an agreement in writing, sold to Lovitt fifty-five shares of stock in a corporation then about to be formed, for which Lovitt gave his note of that date for two thousand nine hundred dollars due in six months. It was understood between Lovitt and Dickinson before this note became due that it was to be renewed. On July 11, 1888, Lovitt executed the note sued upon, dating it the 27th of that month, and gave it to Dickinson in renewal of the former one, and Dickinson indorsed it to the bank on the same day. Lovitt paid the interest accrued on the original note.

For the purposes of the trial only it was agreed "that the note sued upon was given for a contract in which the payee of the note agreed to sell certain shares of stock which then had no existence, and deliver the same when the corporation was formed and stock certificates issued; that the corporation never was formed and the stock certificates never issued, and that there was a complete failure of consideration of the note; that said Dickinson, the payee of the note, having made the contract set forth in defendant's answer, at all times from and after the making of the same up to the present time knew of its existence and terms."

W. B. Clark was president, Mr. McKnight cashier, and Dickinson vice-president of the plaintiff bank when the bank acquired the note sued upon. They were all active officers, and Dickinson was also a director. Dickinson had a conversation with Clark, the president, in which he said he had or expected to get the note of Lovitt. He then asked Clark whether the bank would take it, and Clark agreed to discount the note. The evidence leaves it in doubt whether this conversation occurred after or a day or two before the note in suit was executed; but it clearly appears that Clark as president agreed to take the note. The note was executed on the 11th of July, and on that day Dickinson indorsed and delivered it to the bank. He at the same time figured up the discount on a deposit slip and handed the slip to the discount clerk or to the cashier, who passed it to the clerk. The discount clerk made the proper entries, placing the amount of the note less ten dollars and thirty cents to the credit of Dickinson, who checked out and used the money. Lovitt was a well-known customer of the bank and had a line of credit thereat.

Dickinson in his evidence says he did not accept the note for the bank, but that Clark did. Clark testified that he agreed with Dickinson to take the note for the bank, but that he left the details of the arrangement to Dickinson, that is to say, to make the entries, receive the paper, and deduct the proper amount of interest for the bank. The ten dollars and thirty cents deducted represented the interest from the 11th of July to the 27th, the latter being the post-date of the note. The officers of the bank, except Dickinson, knew nothing about the contract between Dickinson and defendant, and the bank had nothing whatever to do with the original note.

The defendant asked the court to declare the law to be that the knowledge of the vice-president of the existence and nature

of the agreement constituting the consideration of the note in suit was the knowledge of the bank, which request the court refused, and this presents the only question for our consideration.

It is a general rule that notice of a fact acquired by an agent while transacting the business of his principal is notice to the principal, and this rule applies to banking and other corporations as well as to individuals. It is the duty of the agent to communicate to the principal information thus acquired, which would affect the rights of the principal; and the presumption is that the agent has performed his duty in this behalf. If he has not, still the principal should be charged with notice of the existence of such facts thus coming to the knowledge of the agent, because he selects his own agent and confides to him the particular business: Story on Agency, section 140. But the reason of the rule ceases when the agent acts for himself and not his principal, and the rule itself ought not to apply in such a case. Accordingly it has been held by this court that knowledge of an unrecorded deed acquired by officers of a corporation, while acting for themselves and not for the corporation, will not be imputed to the corporation: *Johnston v. Shortridge*, 93 Mo. 227.

An officer of a banking corporation has a perfect right to transact his own business at the bank of which he is an officer, and in such a transaction his interest is adverse to the bank, and he represents himself and not the bank. The law is well settled that, when an officer of a corporation is dealing with it in his individual interest the corporation is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the property which is the subject of the transaction: Taylor on Corporations, 2d ed., sec. 210; 1 Waterman on Corporations, sec. 135; *Frenkel v. Hudson*, 82 Ala. 158; 60 Am. Rep. 736; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481; 26 Am. Rep. 784; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332; 52 Am. Rep. 710.

In the case last cited, the court, after speaking of the general rule that knowledge of the agent will be imputed to the principal, says: "But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position he assumes conflicts entirely with the idea that he represents the interest of the bank. . . . A director offering a note, of which he is the

owner, for discount, or proposing for a loan of money on collateral security alleged to be his own property, stands as a stranger to it."

Now, the facts set up to defeat a recovery here are the facts constituting the transaction between Dickinson and the defendant, in which Dickinson did not represent or profess to represent the bank, and with which the bank had nothing whatever to do. Again, Dickinson in offering the note to the bank for discount represented his own personal interest; and, Clark, the president, represented the bank. In this particular transaction Dickinson occupied the position of any other customer, and not that of an officer or agent of the bank; and it must follow from the principles of law before stated that the bank is not chargeable with his knowledge of uncommunicated facts affecting his title to the note. But it is said Dickinson fixed and figured out the discount, and hence he did in point of fact represent the bank. The note bore interest at the rate of eight per cent per annum from date; and it appears Dickinson calculated interest at that rate from the 11th of July, the date of the transaction, to the 27th of that month, the date of the note, and deducted as discount ten dollars and thirty cents; but it does not appear who designated the amount of discount to be paid. The broad fact remains that the president of the bank agreed to take the note, and that the bank accepted the discount as figured up by Dickinson; and the fact, if such it was, that he may have designated the rate of discount in the first instance is wholly immaterial. He nevertheless represented his own interest in the entire transaction.

The judgment is affirmed.

All concur.

AGENCY—NOTICE TO AGENT WHEN NOTICE TO PRINCIPAL.—The knowledge of an agent will affect his principal with notice if acquired by him during his agency and in the course of the same business from which the principal's rights and liabilities arise: *Snyder v. Partridge*, 138 Ill. 173; 32 Am. St. Rep. 130, and note; *Littauer v. Houck*, 92 Mich. 162; 31 Am. St. Rep. 572, and note; *Follette v. Mutual Accident Assn.*, 110 N. O. 377; 28 Am. St. Rep. 693, and note; *Burditt v. Porter*, 63 Vt. 296; 25 Am. St. Rep. 763; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401. See also the extended notes to *Tventor v. Pothen*, 24 Am. St. Rep. 228, and *Fairfield Sav. Bank v. Chase*, 39 Am. Rep. 322.

CORPORATIONS—NOTICE TO OFFICER WHEN NOT NOTICE TO CORPORATION. Notice to a corporation is not inferable from the knowledge of one of its officers when his interest is opposed to that of the corporation: *Commercial*

Bank v. Cunningham, 24 Pick. 270; 35 Am. Dec. 322, and note; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332; 52 Am. Rep. 710; *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 268; 9 Am. St. Rep. 698; *Kochler v. Dodge*, 31 Neb. 328; 28 Am. St. Rep. 518. See, for a further discussion of this question, the extended notes to *Fairfield Sav. Bank v. Chase*, 39 Am. Rep. 322, and *Logansport v. Justice*, 39 Am. Rep. 84.

LARRABEE v. FRANKLIN BANK.

[114 MISSOURI, 592.]

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCE BY CORPORATIONS.—

An insolvent debtor, whether a corporation or a private person, may prefer a *bona fide* creditor to the exclusion of others unless such preferment deprives the corporation of the power to continue in its due course of business and renders it necessary for it to suspend.

CORPORATIONS—INSOLVENCY OF CREDITORS HOW AFFECTED BY.—

The insolvency of a corporation does not *per se* abrogate its power to continue the management of its assets. It may continue in its due course of business so long as there is a fair and honest prospect of redeeming its fortunes, and may pay off debts in the regular course of business, although a part of the creditors are thereby deprived of their security.

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.—

Under the Missouri statute a preference of any creditor in a voluntary assignment for the benefit of creditors renders such assignment void.

ASSIGNMENT FOR BENEFIT OF CREDITOR BY INSOLVENT CORPORATION—PREF-

ERENCE AVOIDING DEED.—If an insolvent corporation assigns the greater part of its property to a creditor, thereby being compelled to suspend, and immediately assigns the remainder of its assets for the benefit of its creditors, both transactions will be considered as a single attempt to evade the assignment law; and such creditor having notice of all the facts and circumstances, and being a party thereto, will not be allowed to profit by the transaction at the expense of the other corporation creditors, but will be compelled to share *pro rata* with them in all the assets of the insolvent corporation.

P. F. Coste, for the appellants.

J. M. Holmes, for the respondents.

BURGESS, J. This is a suit in equity in the nature of a creditor's bill by three creditors of the Kendall-Bayle Cracker Company, joined as plaintiffs, against the Franklin Bank, the Kendall-Bayle Cracker Company, its officers and directors, and P. R. Flitcraft, as assignee of the Kendall-Bayle Cracker Company, for the benefit of its creditors. The defense consists mainly in a denial of the allegations and charges of the bill.

The Kendall-Bayle Cracker Company was a corporation engaged in the manufacture and sale of crackers in the city

of St. Louis. The stock of the company was full paid, and was owned in nearly equal proportions by Messrs. Kendall, Bayle, Daniels, and Cole. The business of the company, at first prosperous, was conducted for a considerable period at a loss, and for some months prior to January, 1888, the company was in a very precarious financial condition. In December, 1887, the company owed to the Franklin Bank twenty thousand dollars, which was evidenced by several notes, a portion of which was indorsed by Mr. Cole and the remainder by Mr. Kendall, both of whom were directors of the company. It owed nearly the same amount to what may be termed outside creditors, amongst whom were plaintiffs, and these debts were wholly unsecured. They had assets of the value of about fifteen thousand dollars, divided in about the following proportions.

Stock on hand. \$7,000

Good accounts. 5,000

Leasehold, machinery, and odds and ends. . 8,000

The company was hopelessly insolvent, and could no longer go on unless matters should change in some manner. To furnish a possible means of raising fresh capital, Bayle and Daniels surrendered their stock to the company for one dollar each, and retired. This situation was well known to the bank and its directors, and they knew that unless fresh capital could be secured or better prices obtained for their crackers the company would be compelled to suspend. They knew also that the only chance for obtaining better prices for the product of the company lay in the action of the "cracker pool," which was to meet in January. They had a secret arrangement with the cracker company by which they were to be notified, when failure should take place, in time to protect themselves. Such was the situation in December, 1887. In the second week in January, 1888, a statement was submitted to the bank from which it appeared that the company was still losing money. Notice was then given by the bank to the company that unless the coming meeting of the "cracker pool," for which the bank agreed to wait, should relieve them, they must furnish additional security for the note next maturing—January 26th or 27th—or they would be "closed." The "cracker pool" met, and refused to advance prices, the directors refused to indorse further, and the concern was at an end.

The directors of the company held a meeting on Thursday,

the 26th of January, resolved to cease business and make an assignment. They instructed their attorney to prepare a deed of assignment, which he did, leaving the date blank. The deed was an ordinary assignment under the statute. On the same Thursday, or possibly on the morning of Friday, the 27th (the evidence is not clear as to which day), the directors of the company, accompanied by their attorney, Mr. Mills, went to the bank and notified them of their failure and of the fact that an assignment had been determined upon. The directors of the company, the attorney and officers of the bank then entered into a consultation to determine the best method of "protecting the bank," and securing for it a preference over other creditors. Mr. Mills was of the opinion that the best method was to attach, as, in his opinion, any plan which required the visible co-operation of the company would be dangerous. Mr. Garrells, the cashier of the bank, had, however, another plan. He was willing to "take the chances." The assets of the company consisted of a leasehold and machinery of small value (the machinery, with various odds and ends, proved to be worth fifteen hundred dollars, and the leasehold proved to be worth one hundred dollars less than nothing), the stock on hand, manufactured and unmanufactured, good debts and bad debts. There was no money. Mr. Garrells had previously arranged with Mr. Moll, his codirector in the bank, and a codefendant in this case, a method for turning the stock into money. His proposition then, at the meeting, was that the bank should take the stock and the good debts, and the assignee should take the machinery and the bad debts. He explained that drafts could be drawn by the company against all its solvent debtors, and turned over to the bank, and that Mr. Moll, one of its directors, could take the stock, thus converting it into money which would be paid over to the bank. This proposition was accepted. Mr. Moll was called up, and reached the bank at the conclusion of the conference. He and Mr. Garrells then went to the factory of the company, and Mr. Moll examined the stock and arranged the terms of purchase. The drawing of the drafts and the making up of the invoice of the stock consumed all of that day and the next. At a late hour in the afternoon of Saturday, the 28th, the drafts having all been drawn and delivered to the bank, and the invoice having been completed, Mr. Garrells and Mr. Moll proceeded to the office of the cracker company. The pres-

ident, Mr. Kendall, handed Mr. Moll the invoice. Mr. Moll handed him his check, he indorsed and handed it to Mr. Garrells, the latter balanced the bank book of the company then and there, passing this check to its credit, and received their check for such balance. At ten o'clock that night the blank date in the deed of assignment was filled in, and it was executed and delivered to Mr. Flitcraft, the assignee, at the Laclede hotel. On the Sunday morning following the stock was transferred in wagons belonging to the various directors of the bank to the warehouse of Mr. Moll. The bank realized from the drafts turned over \$5,181.44, from the check of the cracker company, being the amount of Mr. Moll's check less the amount the company was overdrawn, \$5,695.95 making a total of \$10,877.39, which they applied to their notes, due and not due. In addition they collected from the indorsers about \$3,000. The assignee received, all told, less than \$3,000. Deducting expenses, he paid a dividend of five per cent.

On final hearing the court rendered the following decree:

"Wherefore the court doth order, adjudge and decree that plaintiffs have and recover of the defendant the Franklin Bank the said sum of \$10,877.39, together with interest thereon from said 27th of January, 1888, at the rate of six per cent per annum, amounting in the aggregate to the sum of \$13,107.26, together with costs of this action, and that an execution therefor be issued to the sheriff of the city of St. Louis in due form, and that the said sheriff, when he shall collect and receive the said sum, shall pay the same to a receiver of the Kendall-Bayle Cracker Company, for the creditors of the Kendall-Bayle Cracker Company, appointed by the court as hereinafter provided.

"And it is ordered and decreed that a receiver for the collection from the sheriff and distribution to the creditors of the said Kendall-Bayle Cracker Company of said fund be appointed as prayed in the petition, and P. R. Flitcraft is hereby appointed receiver for such purpose. It is further ordered that the said P. R. Flitcraft, before entering upon the execution of his said trust, execute and file in this court a bond in the penal sum of \$25,000, with one or more sureties, to be approved by the court, conditioned for the faithful discharge of his duties as receiver under this decree, and for the faithful accounting for all the funds which may come into his hands as such receiver; that upon the execution, approval, and fil-

ing of said bond, the sheriff of the city of St. Louis shall pay over to said P. R. Flitcraft, receiver, all sums of money which he may collect or may have collected from the defendant, the Franklin Bank, in pursurance of this decree; that the said P. R. Flitcraft, receiver as aforesaid, shall appoint a day within three months after the filing and approval of his bond as herein provided, and a place when and where he will proceed to adjust and allow demands against said fund. He shall give notice of such time and place by advertisement published in the Star Sayings for four weeks successively, the last insertion to be at least one week prior to the day appointed. He shall also give notice to all of the holders of demands whose residence is known to him, by letter addressed to them, at least four weeks prior to the day appointed.

"That said P. R. Flitcraft, receiver, shall attend at the place designated in said notice in person on said day, and shall remain in attendance during said day and two consecutive days thereafter, and shall adjust and allow all claims and demands against said trust fund.

"The said P. R. Flitcraft shall, with all convenient speed, report to the court all claims and demands by him allowed or rejected for approval by the court, and also all costs and expenses of this suit and proceeding, including counsel fees to plaintiffs and a reasonable compensation to himself, to be determined by the court, and the balance of said fund he shall distribute as and when the court may determine amongst the holders of demands allowed by him and approved by the court.

"It is further ordered that this action be dismissed as to the defendants, the Kendall-Bayle Cracker Company, George J. Kendall, Charles B. Cole, John Rankin, Adolph Moll and P. R. Flitcraft."

The court rendered a decree against the Franklin Bank and in favor of the other defendants. The bank appealed, and plaintiffs took a cross-appeal from the decree in favor of Mr. Moll.

It is well settled in this state that an insolvent debtor may prefer a *bona fide* creditor in the payment of his debts to the exclusion of others: *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79; *Shelley v. Boothe*, 73 Mo. 74, 89 Am. Rep. 481; *Dougherty v. Cooper*, 77 Mo. 528. And this rule applies alike to corporations and private persons, unless by such preferment it deprives the corporation of the power to continue in

its due course of business and renders it necessary for it to suspend. "And it has been held that the insolvency of a corporation does not *per se* abrogate its power to continue the management of its assets, but that it may continue in its due course of business, so long as there is a fair and honest prospect of redeeming its fortunes, and may pay off debts in regular course of business, though a part of the creditors are thereby deprived of their security": *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79, 2 Morawetz on Private Corporations, sec. 786, and cases cited. This question will be further discussed in the course of this opinion.

At the time of the sale of about all of the stock of the cracker company, and its solvent accounts against its customers to Mr. Moll, one of the directors of the defendant bank, the deed of assignment of the remainder of the stock and effects, which amounted to very little, had already been drawn up and was held up as is clearly shown by the evidence at the request of the defendant bank until drafts were drawn by the cracker company on its customers in favor of the bank for all of its available and outstanding accounts, an inventory taken of the stock purchased by Moll when he gave his check in favor of the company for the amount of the purchase, and which was immediately turned over to the bank in part payment of the cracker company's indebtedness to it. Then it was that the deed of assignment was executed by the cracker company and delivered to the assignee, Mr. Flitcraft. Was this all one and the same transaction, and part of the same scheme?

If so, under the laws of this state, the transaction between the cracker company and the defendant bank by its officers was void and of no effect, and the defendant bank must account for the amount realized by it from the transaction and share *pro rata* with the other creditors of the cracker company. If not the same transaction, then it cannot be compelled to do so. Section 424 of the Revised Statutes of 1889 provides that, "every voluntary assignment of lands, tenements, goods, chattels, effects and credits made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor in proportion to their respective claims; and every provision in any assignment providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities (including judgments entered by confession thirty days

previous to such assignment) shall be paid *pro rata* from the assets thereof; and every such assignment shall be proved or acknowledged. . . . ” Under this statute no preference of any creditor can be made by voluntary assignment, and a provision in a deed of assignment making such a preference is null and void and of no effect: *Crow v. Beardsley*, 68 Mo. 437.

In the case of *Sampson v. Shaw*, 19 Mo. App. 274, where the debtor on the thirteenth day of June, 1881, executed a chattel mortgage on his personal property, and on the following day made an assignment by deed duly executed, and there was no evidence whatever that the execution of the mortgage and deed of assignment were a part of the same transaction, or that the debtor was intending to make an assignment at the time he executed the mortgage, it was correctly held that the mortgage was valid, upon the ground that while the mortgagor retained dominion of his property he may encumber and convey it as he pleases, if not directly forbidden by law, and prefer such creditors by payment and transfer as he chooses: *Wakeman v. Grover*, 4 Paige, 23; *Blakey's Appeal*, 7 Pa. St. 449; *Lampson v. Arnold*, 19 Iowa, 484.

So it was held by this court in the case of *Hargadine v. Henderson*, 97 Mo. 375, that, “The assignment law of Missouri is not in letter or spirit a bankrupt or insolvent debtor's act. A debtor, whether solvent or insolvent, may, in good faith, sell, deliver in payment, mortgage or pledge, the whole or any part of his property for the benefit of one or more of his creditors, to the exclusion of others, even though such transfers may have the effect of delaying them in the collection of their debts. Its terms in no way qualify the rule by which the character of this instrument is to be determined. Reading the instrument, then, as a whole, in the light of the circumstances under which it was executed, was it intended as a security, or as an absolute unconditional conveyance, *in presenti*, to the grantee of all the grantor's interest in the property, both legal and equitable, to the exclusion of any equitable right of redemption?” And it was accordingly held that the law of assignments was not applicable to a deed of trust, which conveyed all of the debtor's property, real and personal (except his homestead, household furniture and a horse and buggy), to a trustee to secure the payment of a part of his debts for which he was liable either as principal or as surety;

and that the deed of trust was not an assignment within the meaning of the assignment law, and that the instrument was binding and valid as against all other creditors.

This case as well also as the case of *Crow v. Beardsley*, 68 Mo. 437, was followed and approved by the supreme court of the United States in the case of the *Union Bank v. Kansas City Bank*, 136 U. S. 223. See also *May v. Tenney*, 148 U. S. 60; *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79.

A different rule is announced by many courts of high authority, which hold that an insolvent debtor cannot so dispose of his property or the principal part thereof by sale, deed of trust or mortgage, so as to prefer one or more creditors to others at the same time intending to make an assignment for the benefit of his other creditors, as such disposition would be an evasion of the assignment law. This has been held in the following cases: *Preston v. Spaulding*, 120 Ill. 208; *White v. Cotzhausen*, 129 U. S. 329; *Berry v. Cutts*, 42 Me. 445; *Holt v. Bancroft*, 30 Ala. 193; *Perry v. Holden*, 22 Pick. 269; *Mussey v. Noyes*, 26 Vt. 471; *Van Horn v. Smith*, 59 Iowa, 142; *United States v. Bank of United States*, 8 Rob. (La.) 302.

The rule thus laid down has also been announced by the federal courts within this state so as to hold a deed of trust in the nature of a mortgage, of all the personal property of the debtor to be a voluntary assignment within the meaning and effect of the Missouri statute: *Martin v. Hausman*, 14 Fed. Rep. 160; *Dahlman v. Jacobs*, 16 Fed. Rep. 614; *Kellog v. Richardson*, 19 Fed. Rep. 70; *Clapp v. Dittman*, 21 Fed. Rep. 15; *Perry v. Corby*, 21 Fed. Rep. 737; *Kerbs v. Ewing*, 22 Fed. Rep. 693; *Freund v. Yaegerman*, 26 Fed. Rep. 812, and 27 Fed. Rep. 248; *State v. Morse*, 27 Fed. Rep. 261. But these federal decisions have all been overruled or a different doctrine announced by the supreme court of the United States in the case of *Union Bank v. Kansas City Bank*, 136 U. S. 223, and *May v. Tenney*, 148 U. S. 60.

But in the case at bar a different state of facts exists from those in either of the federal cases cited. Here the transactions were all parts of the same scheme, which, we hold, amounted to absolute conveyance *in presenti*. It seems clear therefore, from the views herein expressed and the authorities cited, that the transfer to Moll, one of the directors of the defendant bank, of about all of the effects of the cracker company, which of itself compelled it to suspend business, and the execution of the deed of assignment, were but one and the

same transaction, in contravention of the statute in regard to assignments, and that the defendant bank by its officers, having notice of all the facts and circumstances and being party thereto, should not be allowed to profit by a transaction or scheme so transparent at the expense of the other creditors of the insolvent company, but, on the contrary, should be held to share *pro rata* with all of the other creditors. This is but equal and exact justice to all creditors, and such seems to be the spirit and intention of the law of assignments. As this necessarily results in the affirmance of the judgment, it is not deemed necessary to pass upon the other questions raised by counsel in the case. There was no error in dismissing the case against Moll.

Judgment affirmed.

All concur.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—RIGHT TO PREFER BONA FIDE CREDITOR.—An insolvent debtor may prefer any *bona fide* creditor by paying or securing the debt, and his other creditors cannot avoid the payment or invalidate the security: *Hoge v. Campbell*, 78 Wis. 572; 23 Am. St. Rep. 422, and note; *Patton v. Leftwich*, 86 Va. 421; 19 Am. St. Rep. 902, and note; *Williams v. Whedon*, 109 N. Y. 333; 4 Am. St. Rep. 460; *State v. Mason*, 112 Mo. 374; 34 Am. St. Rep. 390; *Born v. Shaw*, 29 Pa. St. 283; 72 Am. Dec. 633, and note; *Ruhl v. Phillips*, 48 N. Y. 125; 8 Am. Rep. 522. The question of lawful and unlawful preferences is thoroughly discussed in *Benham v. Ham*, 5 Wash. 128; 34 Am. St. Rep. 851, and the note thereto where the cases are collected. See also the monographic note to *Bank v. Hoeber*, 57 Am. Rep. 363.

CORPORATIONS—INSOLVENT—RIGHT TO PREFER CREDITORS.—A corporation may prefer one creditor to another: *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263; *Rollins v. Shaver Wagon etc. Co.*, 80 Iowa, 380; 20 Am. St. Rep. 427, and note; *State v. Bank*, 6 Gill & J. 205; 26 Am. Dec. 561; *Lexington etc. Ins. Co. v. Page*, 17 B. Mon. 412; 66 Am. Dec. 165, and note. In *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493; 15 Am. St. Rep. 644, it was held that under the laws of Ohio an insolvent corporation could not prefer a creditor.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

JANES v. FALK.

[50 NEW JERSEY EQUITY, 468.]

TRUST, DECLARATIONS OF, WHEN EFFECTUAL TO PASS AN EQUITABLE TITLE.—An unequivocal declaration by the owner of property, that he holds it in trust for the benefit of a designated donee vests in such donee an absolute equitable title, although he is not informed of the trust, and the memorandum relied on is not delivered to anyone as a declaration of trust.

TRUSTS.—A COMPLETE AND IRREVOCABLE TRUST IS ESTABLISHED by the executor and trustee of an estate, when after converting to his own use certain assets of such estate he places in a box among other papers relating to the estate a policy of insurance upon his own life, with a letter stating that the policy is collateral security for the payment of his indebtedness to the estate, and does thereafter not regard the policy as his individual property, but as being held in trust for the estate, the evidence being that the persons interested in the estate were on several occasions informed, through their representatives and counsel, that he had disposed of some of the securities belonging to the estate, but had secured the estate by substituting this insurance policy, and held the policy for the benefit of the estate, and that after his removal from the executorship and the appointment of an administrator, the policy was formally assigned and duly delivered to the latter.

Augustus W. Cutler, for the appellant Janes.

Theodore Little, for the respondent.

DIXON, J. In supplementary proceedings to collect a judgment obtained by James M. Frost against Daniel D. Craig in the New York city court the complainant, Isaac N. Falk, was, on December 2, 1889, appointed by that court receiver of all the property, real and personal, of said Craig. The New York Code of Civil Procedure enacts:

"Section 2468. The property of the judgment debtor is vested in a receiver from the time of filing the order appointing him. . . . section 2469. Where the receiver's title to personal property has become vested it also extends back by relation for the benefit of the judgment creditor so as to include the personal property of the judgment debtor at the time of the service of the order or warrant" to bring him before the judge for examination. Such a warrant was served on Craig November 9, 1889.

On May 13, 1890, the complainant filed his bill in the court of chancery against Daniel D. Craig, the Mutual Life Insurance Company of New York, Lewis T. Janes, administrator *cum testamento annexo* and trustee under the will of Henry Baird, deceased, and others, setting forth that on November 9, 1889, the said Craig was entitled to a certain endowment policy of life insurance issued to him upon his life by said insurance company for the sum of two thousand five hundred dollars; that the said policy was claimed and held by said Janes to secure an indebtedness from said Craig to the Baird estate, and praying a decree to establish the title of the complainant in the policy, and direct its delivery to him, or else to order that the policy be sold, and out of the proceeds the complainant be first paid the amount of the said judgment against Craig. Pending the suit Craig died, and the insurance company brought the amount due on the policy into court, submitting its disposal to the chancellor's decree upon the contending claims of the complainant and the defendant Janes. After answer by Janes asserting his prior title, a decree was made sustaining the right of the complainant, and from this decree the administrator appeals.

The complainant having come into a court of equity for redress, must, of course, recognize the equitable rights of the defendant: 1 Pomeroy's Equity Jurisprudence, sec. 385. His own claims, whether legal or equitable, did not accrue before November 9, 1889, and if prior to that time the defendant obtained an equitable interest in the policy, it must be deemed paramount to the complainant's title. In this court the equitable estate is considered to all intents and purposes as a legal estate (*Cushing v. Blake*, 30 N. J. Eq. 689), and "*prior in tempore potior est in jure*" when other reasons for equitable preference are not found: *Brown v. Hendrickson*, 39 N. J. L. 239.

With regard to the claim of the appellant Janes, as administrator and trustee of the estate of Henry Baird, the case

presents the following features: That Daniel D. Craig was the executor and trustee of that estate from January 20, 1888, until November 8, 1889, when he was removed; that as early as February, 1889, he had converted to his own use assets of the estate to the amount of two thousand dollars; that then he placed the said policy of insurance among the papers of the estate in a tin box, and with it put a letter saying that the policy was collateral for the payment of his indebtedness to the estate of Henry Baird; that thereafter (according to his testimony) he did not regard the policy as his individual property, but held it in trust for the Baird estate; that on several occasions between February and November, 1889, he informed those interested in the Baird estate, through their representatives and counsel, that he had disposed of some of the securities belonging to the estate, but had secured the estate by substituting this insurance policy, and that he held the policy for the benefit of the estate; that after the removal of Craig as executor on November 8th and the appointment of Janes as administrator on November 14, 1889, the policy, with a formal assignment from the former to the latter, was duly delivered to the administrator.

These facts form a perfect declaration of trust in favor of the beneficiaries of the Baird estate, making them the equitable owners of the policy for the purpose of reimbursement, and constituting Craig, at the time when his rights are said to have passed to the complainant, a mere trustee for those beneficiaries.

The principle upon which this conclusion rests is thoroughly settled in equity. As applied to mere gifts it is thus stated by Professor Pomeroy (2 Pomeroy's Equity Jurisprudence, sec. 997):

"A person holding property, real or personal, and intending to make a voluntary disposition thereof for the benefit of another, may do so in any one of three modes: 1. He may make a simple conveyance or assignment of it directly to the donee, so as to vest in the latter whatever interest and title the donor has, without the intervention of any trust; 2. He may make a transfer of it to a third person upon trusts declared in favor of the donee; 3. He may retain the title, and declare himself a trustee for the donee, and thus clothe the donee with the beneficial estate. . . . If the donor adopts the second or third mode he need not use any technical words or language in express terms creating or declaring a trust, but

he must employ language which shows unequivocally an intention on his part to create a trust in a third person or to declare a trust in himself. It is not essential, however, that the donor should part with the possession in the cases where he thus creates or declares a trust. These conclusions are sustained by the decided weight of authority, and must be regarded as the settled rules of equity jurisprudence upon the subject."

The numerous cases cited in the notes to the foregoing text fully warrant the doctrines enunciated. The following more recent cases may also be referred to for illustration of the rule applicable to the case in hand: *Fox v. Hawks*, L. R. 13 Ch. Div. 822; *In re Breton's Estate*, L. R. 17 Ch. Div. 416; *In re Vernon*, L. R. 32 Ch. Div. 165; *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159; 35 Am. Rep. 365; *In re Smith's Estate*, 144 Pa. St. 428; 27 Am. St. Rep. 641; *Connecticut River Savings Bank v. Albee*, 64 Vt. 571; 83 Am. St. Rep. 944.

Many of these cases also hold that it is not essential that the memorandum relied on should have been delivered to any one as a declaration of trust, or that the *cestui que trust* should have been informed of the trust, the presence or absence of these circumstances being material only in considering whether the trust has been actually declared.

The cases cited are mostly instances of voluntary gifts, and therefore they demonstrate that upon a declaration of trust the *cestui que trust* acquires an absolute equitable estate or title, and not a mere right to ask for a title, for it is the settled doctrine of equity not to aid in perfecting a gift, and only to recognize an intention to give when it is completely executed, and has resulted in the creation of a trust estate. If there be a valuable consideration between the alleged trustee and *cestui que trust* then, under the equitable rule that what ought to be done will be considered as done, the court may deem a contract to declare a trust as equivalent to an actual declaration. But with that principle we are not now dealing—we are concerned only with the question whether a trust was really declared.

Recurring to the facts above stated we find that there was no attempt on the part of Craig to transfer the policy to any other person than himself, for the reason that he was himself the legal representative of those whom he meant to benefit by his act; that he placed the policy among the papers of the

Baird estate with the letter stating his purpose, thereby to indicate that he held the policy just as he held the other papers, as trustee for the Baird estate; that he informed the beneficiaries that the policy was substituted for, held instead of, by the same right as, the securities of the estate, and that he considered the policy, not as his own, but as trust, property. These purposes, acts, and declarations are not equivocal. They distinctly manifest Craig's intention that the Baird estate should have the benefit of the policy; that this benefit should be acquired, not by his assignment of the policy, but by a change in the character of his own possession of it, and they show this intention executed by act, and declared by writing and by speech. The rights thus created were irrevocable. They might be defeated if the evidence of them should be suppressed, or if Craig should abstract the policy as he had abstracted other securities of the estate, but he could not, in a lawful sense, revoke the rights which he had conferred. He had made himself trustee of this policy as perfectly as he was of the other property of Henry Baird, deceased.

If this equitable estate had been created as a mere gift the respondent, representing a creditor, might have assailed it on that ground; but as it was created for the benefit of equitable creditors whom Craig had a right to prefer we see no reason for postponing it to the respondent's claim.

The decree in favor of the complainant should be reversed, and a decree should be entered directing that out of the proceeds of the policy the administrator of the Baird estate be first paid the amount of Craig's indebtedness to him, and then the complainant the balance, if any.

TRUSTS—DECLARATIONS OF, WHEN SUFFICIENT TO PASS EQUITABLE TITLE.—The title to personal property may be transferred by a clear and unequivocal declaration on the part of the donor that he holds the property in trust for the donee, or by acts which are equivalent to such a declaration: *Williamson v. Yager*, 91 Ky. 282; 34 Am. St. Rep. 184, and monographic note, in which the question of the creation of voluntary trusts by the declaration of the trustor is thoroughly discussed.

WILLARD v. DENISE.

[50 NEW JERSEY EQUITY, 482.]

CORPORATIONS, WHEN CHARGEABLE WITH KNOWLEDGE OF AGENT.—

Knowledge casually obtained by a corporate agent is not imputed to the corporation, unless the corporation acts through such agent in a matter in which the information possessed by him is pertinent.

Peter Backer, for the appellant.

E. W. Arrowsmith and Frank P. McDermott, for the respondent.

GARRISON, J. This is a contest over surplus money paid into the court of chancery in a foreclosure suit, after the complainant's mortgage had been satisfied out of the proceeds of the sale of the mortgaged premises. The struggle for priority is between two mortgages made by Mary E. Taylor in 1889, one to Annie E. Denise, the respondent, and the other to the Asbury Park National Bank, the petitioner. Respondent's mortgage, though earlier in execution and delivery, remained unrecorded at the time the petitioner's mortgage was placed upon the record. The question in the case is whether the bank had notice of the earlier unrecorded mortgage. The facts upon which notice to the bank is asserted are these: George W. Byram, an attorney at law in active practice, was, during the period covered by the whole of this transaction, likewise president of the Asbury Park National Bank. In the course of his legal business he had actual knowledge of the making and delivery of the respondent's mortgage, which was, in fact, drawn and executed in his office and witnessed and acknowledged before him as a master in chancery. This was in April, 1889. In October of the same year, Mr. Byram, as president of the bank, participated in the taking of the other mortgage executed by the same mortgagor upon the same premises six months later. By his actual participation in this latter transaction, the knowledge of the earlier mortgage possessed by Byram is imputable to the corporation whose agent he was. The fact that the information had not been acquired by him in the course of his agency does not militate against the application of the rule in question, when the agent personally participates in the later transaction in behalf of the corporation.

Where information is casually obtained by an agent for a corporation, the corporation is not charged with notice from the mere fact of its agent's knowledge, but if the corporation

act through such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal. To bring about this result two things must concur, viz., the possession by the agent of pertinent information and his personal participation in respect thereto on behalf of his corporation.

This doctrine is illustrated by numerous modern adjudications and is correctly stated by the more recent text-writers: 1 Morawetz on Private Corporations, sec. 540; Wade's Law of Notice, 2d ed., 675, 676; *First Nat. Bank v. Christopher*, 40 N. J. L. 435; 29 Am. Rep. 262.

The order of the chancellor, awarding the surplus money to the respondent, is affirmed.

CORPORATIONS—WHEN CHARGEABLE WITH KNOWLEDGE OF AGENT.—Notice to an agent of a corporation of any fact or facts connected with the business in which he is employed is notice to the corporation: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401. The rule that notice to the agent of a party, whose duty it is, as such agent, to act upon such notice, in the discharge of his trust as agent, is legal notice to his principal, applies to the agents of corporations, both municipal and private as well as to those of private persons: *Burlitt v. Porter*, 63 Vt. 296; 25 Am. St. Rep. 763. See the extended notes to *Trentor v. Pothan*, 24 Am. St. Rep. 228-233, and *Logansport v. Justice*, 39 Am. Rep. 85, also *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519, ante, 770, and note. A principal is not affected by the knowledge of his agent acting in a different transaction and for another principal, unless it is first shown that such knowledge was present in the mind of the agent at the very time of the transaction now in question: *Constant v. University*, 111 N. Y. 604; 7 Am. St. Rep. 769, and note.

BROWN v. CORIELL.

[60 NEW JERSEY EQUITY, 752.]

MORTGAGES—REDEMPTION—SETOFF.—The redemption of a mortgage cannot be effected by setting off against the mortgage debt an independent personal demand which the mortgagor has against the mortgagee.

Abraham V. Schenck, for the appellants.

Allan H. Strong, for the respondents.

REED, J. The undisputed facts in this case are these: One Peter V. Conover had married a daughter of one Stephen Brown, senior. Peter V. Conover was indebted to his wife. He was also indebted to his father-in-law, Stephen Brown, senior. While so indebted he became a defendant in an action brought against him as surety on the bond of a third

person. In view of this proceeding against him, he wished to secure his wife and father-in-law. This purpose was accomplished in this way: Conover gave a mortgage upon his real estate to his father-in-law for the amount of both debts. The father-in-law gave his own promissory note to Mrs. Conover for the amount of her claim against her husband. Mrs. Conover and her father died. When she died she held the note mentioned. There was also found after her death another note for one thousand dollars, made by Stephen Brown, senior, and payable to Mrs. Conover.

The bill in the present suit was filed by Peter V. Conover as the administrator of his deceased wife, against the executors of Stephen Brown, senior. The bill prays that the mortgage made by Peter V. Conover to his father-in-law, Stephen Brown, senior, to secure the debts mentioned, may be decreed to be the property of the complainant, as administrator of his wife; also, that the two promissory notes made by Stephen Brown, senior, to his daughter, Mrs. Conover, may be surrendered to the complainant, or that the amount due on such instruments or payments received upon them may be decreed to be paid to the complainant; also, for a discovery of all notes, securities, or obligations made by Stephen Brown, senior, to Ann E. Conover, which the defendants may have or know of.

Peter V. Conover having died, Abner S. Coriell was appointed administrator *de bonis non* of Ann E. Conover.

A decree was made that said Coriell, as such administrator, was entitled to recover from the executors of Stephen Brown, senior, the amount of both of the notes in question, and that the moneys due on them should be applied, in the first place, to the satisfaction of the mortgage given by Peter V. Conover to the said Stephen Brown, senior.

It was decreed that the said mortgage should be surrendered to be canceled of record.

We are of the opinion that the facts in this case show no equitable ground upon which this decree can stand. In the first place, the conclusion which we draw from the testimony is, that the transaction between the three persons, Peter V. Conover, his wife, Ann E. Conover, and Stephen Brown, senior, as a part of which the first-mentioned note was given, was a novation. The husband assumed the position of debtor to his father-in-law for the amount of his debt to his wife, and secured his father-in-law by mortgage. The father assumed

the position of debtor to his daughter in consideration of this security given him by the husband. The wife and daughter accepted the note of the father and discharged her husband.

A legal obligation sprang into existence, from father to daughter. The note given by him to her was not a mere memorandum of the amount of her interest in the husband's mortgage. It was a legal debt, and its creation left in her father the legal title to the entire amount of the mortgage. The right to collect this note in a court of law upon the death of the payee passed to her husband as her administrator. The right to collect the amount of the mortgage from Conover, the husband, passed upon the death of Stephen Brown, senior, to his executors.

In this condition of affairs no jurisdiction in a court of equity to seize upon the note and the mortgage existed. The right of the administrator to enforce the collection of the note, in an action at law, was complete. The authority to enforce the mortgage against Conover personally was a distinct affair. Even if the parties to the note and to the mortgage were identical, an insuperable objection to this decree would be presented, for it is perceived that the suit would amount to an attempt to redeem the mortgage by setting off this note against the mortgage. Now, it is entirely settled in this state that in a suit instituted to foreclose the mortgage, the defendant cannot set off any demand he may have against the mortgage debt. This rule rests upon the ground that such a suit is not a personal action, but a proceeding *in rem.*: *White v. Williams*, 8 N. J. Eq. 376; *Dolman v. Cook*, 14 N. J. Eq. 67; *Bird v. Davis*, 14 N. J. Eq. 471; *Dudley v. Bergen*, 23 N. J. Eq. 397; *Vanatta v. New Jersey Mut. Life Ins. Co.*, 31 N. J. Eq. 17; *Parker v. Hartt*, 32 N. J. Eq. 225.

It follows, as a matter of course, that such a setoff cannot be accomplished by a suit by the mortgagor to redeem by applying such an independent personal demand upon the mortgage.

Upon this ground, we are of the opinion that there was an absence of jurisdiction to make the decree respecting this note.

But had this court concluded that Stephen Brown, senior, held the mortgage partly in trust for his daughter, and that his note was given merely as evidence of the amount of her interest in it, I yet conceive that the decree would be questionable. The mortgage was that of Conover individually. The trust would have been in his favor only as the adminis-

trator of his wife. Her estate was unsettled. His interest *jure mariti* in her estate was in the remainder after payment of her debts. Yet before this remainder is ascertained, and without a determination whether any will exist, this decree applies a part of the assets to the payment of the personal debt of the husband.

The second note which is applied to the payment of the mortgage stands upon the same footing as the first, in respect of the absence of an equitable right to collect it or apply it to the mortgage. Assuming that it was an existing demand against the estate of Stephen Brown, senior, it was a strictly legal personal claim enforceable at law. No ground for the assertion of equitable control over it appears in the cause.

The decree is reversed. —

SETOFF—REDEMPTION OF MORTGAGE—DEBT DUE MORTGAGOR BY MORTGAGEE.—A claim for damages against a mortgagee on account of his illegal seizure and conversion of personal property which was not advanced by him to the mortgagor under the agreement between them is available as a set-off under a bill for redemption: *Conner v. Smith*, 88 Ala. 301. Where a note secured by a mortgage purchased by one of the heirs of the deceased mortgagor is transferred as security for his own debt, in an action by the transferee to foreclose he can recover the amount of his debt with costs and attorney's fees, and the transferor being indebted to the estate of the mortgagor, the heirs may by cross-bill set off that indebtedness against the balance due on the mortgage debt: *Brown v. Scott*, 87 Ala. 453. In an action to foreclose a mortgage, the mortgagor may set up in the same action his claim for damages for a breach of warranty of the mortgaged property in reduction of the amount due on the mortgage, and may defeat the action altogether if his damages are equal to the unpaid purchase price: *Massachusetts Loan etc. Co. v. Welch*, 47 Minn. 183. An unliquidated demand growing out of a matter not germane to the subject under litigation cannot be set off against a mortgage sought to be foreclosed, when there are no equitable circumstances shown to have such a demand applied as an equitable setoff: *Litch v. Clinch*, 136 Ill. 410.

BROOKS v. COOPER.

[50 NEW JERSEY EQUITY, 761.]

CONTRACTS, WHEN VOID AS AGAINST PUBLIC POLICY.—If a contract is of such a nature that it cannot be carried into execution without reaching beyond the parties, and exercising an injurious influence over the community at large, everyone has an interest in its suppression, and, from a due regard to the public welfare, it will be declared void.

CONTRACTS CONTRAVENING STATUTES, INVALIDITY OF.—An agreement which discloses an intention to contravene a statute, in fraud of the public, or to the injury of private parties, savors of a conspiracy, and is vicious and unenforceable. If such an intention is once found to exist, the law cannot presume that the agreement is without the effect intended by the parties, in order to confer upon it the quality of enforceability.

CONTRACTS, WHEN VOID AS AGAINST PUBLIC POLICY.—Contracts are against public policy, and therefore void, whenever their subject matter tends to produce injustice or oppression, restraint of liberty or of legal right, to obstruct or pervert the administration of the law, to interfere with or control executive, legislative, or other official action; or to prevent competition, whenever a statute or any known rule of law requires it.

EQUITY—ILLEGAL CONTRACTS—IN PARI DELICTO.—A court of equity will not aid either party to an illegal contract, but will leave both where it finds them.

CONTRACT IS NOT ENFORCEABLE WHICH CONTRAVENES THE POLICY OF A STATUTE.—The policy of a statute requiring “the governor, comptroller, and secretary of state, or a majority of them,” to designate, every year, the newspapers which are to publish the laws in each county—the selection to be carried out on such a basis that the publication may be made in the newspapers having the largest circulation, and in as many newspapers belonging to each of the two leading political parties of the county as there are representatives from such county in both branches of the legislature—is contravened by an agreement in which the proprietors of two newspapers, both of which belong to one of the two leading political parties of a certain county, stipulate that “there shall be no antagonism between them in their efforts to obtain the business of the publication of the laws of the state for their respective newspapers” during a specified period, and that “in case of the designation of either paper to publish the laws, the net amount received for this service, after paying the expenses of the said publication, shall be equally divided between the two newspapers.” Such a contract on its face assumes to control the manner in which the selection of the newspapers shall be made, and virtually attempts to dictate to the public body appointed by law to administer the statute a course of action inconsistent with those provisions which designate the objects, purposes, and policy of the legislature.

James M. E. Hildreth and Herbert W. Edmunds, for the appellants.

Morgan Hand, for the respondent.

LIPPINCOTT, J. By an act of the legislature of this state entitled “An act relative to the publication of the laws of

this state in the newspapers," approved May 6, 1887 (P. L. of 1887, p. 260), it is provided in section 2:

"That the governor and comptroller shall, within ten days after this act shall become a law, and thereafter annually, within thirty days after the day fixed in January for the convening of the legislature, select and designate the newspapers to publish the laws upon the following basis: 1. To select as many in each county as there are representatives from that county in both branches of the legislature not exceeding six, such selection to be of an equal number of newspapers representing each of the two leading political parties, having reference also to such of them as have the larger circulation."

In 1889 a supplement to the act of 1887, above cited, was enacted, approved May 16, 1889 (P. L. of 1889, p. 462), by which section 2 was amended to read as follows, viz:

"That the governor, comptroller and secretary of state, or a majority of them, shall, within ten days after this shall become a law, and thereafter annually within thirty days after the date fixed in January for the convening of the legislature, select and designate the newspapers to publish the laws upon the following basis: 1. To select as many in each county as there are representatives from that county in both branches of the legislature not exceeding eight, such selection to be of an equal number of newspapers representing each of the two leading political parties, having reference also to such of them as have the larger circulation."

On March 8th, in the year 1890, the appellants and respondent entered into a written agreement as follows, viz:

"AGREEMENT.

"It is hereby agreed, between Alfred Cooper, publisher of the 'Gazette,' at Cape May Court House, N. J., and Aaron W. Hand, one of the publishers of the 'Star of the Cape' newspaper at Cape May City, N. J., and representing his firm, that there shall be no antagonism between them in their efforts to obtain the business of the publication of the laws of the state for their respective newspapers during the present term of State Senator Walter F. Leaming, but that in case of the designation of either paper to publish the laws the net amount received for this service, after paying the expenses of the said publication, shall be equally divided between the two newspapers. It is also agreed, between the parties aforesaid, that the 'Star of the Cape' shall be designated to pub-

lish said laws for the year 1890, and that the 'Gazette' shall be designated for this purpose in the year 1891.

[SIGNED] ALFRED COOPER,
AARON W. HAND."

By the bill, answer and proofs it appears that in the county of Cape May there was but one member of the legislature in each branch thereof—a senator and one assemblyman—and, therefore, the governor, comptroller and secretary of state, comprising the body having the selection, could only select one newspaper of each of the leading political parties in the county of Cape May. It appears, after this agreement was made, the Star of the Cape was selected and designated as the newspaper representing one of the leading political parties, to publish the laws of this state for the year 1890, at the rates of compensation fixed for such publication. The selection and designation and rates were made and fixed under the act of 1889. It also appears that the agreement above referred to was complied with by the appellants and respondent, and the net profits of the publication for that year were divided between them.

By the bill of complaint it is alleged that, under this agreement, the appellants published the laws for the year 1890, and thereby acquired the distinction and prestige of such publication which the respondent claims is of value and benefit to the newspapers selected and the proprietors thereof, and received the compensation therefor. The expenses of the said publication for that year were submitted to the respondent and approved by him, and the one-half part of the net profits of such publication was by the appellants paid to the respondent according to the agreement.

The appellants and respondent both allege in substance that their respective newspapers had the larger circulation in the county. The respondent alleges that there was an unsettled dispute in relation to the question which had the larger circulation, the Star of the Cape, belonging to the appellants, or the Gazette, belonging to the respondent.

It further appears by the bill, answer, and proofs that the respondent was very anxious, in accordance with the terms of the agreement, to secure for the Gazette the publication of the laws for the year 1891, but because of some difficulties, fancied or otherwise, which had arisen since the making of the agreement, or had existed previously between himself and some one or more members of the body empowered by law to

make the selection, he became convinced that he could not succeed in having his paper selected for that purpose; and that it was further agreed, between appellants and respondent, that the respondent should make no effort to have his newspaper so selected for that year; that he would forego the distinction and prestige of such publication in his newspaper and make no opposition to the selection and further publication in the Star of the Cape of the laws of that year; and that the agreement to share the net profits of such publication was then and there expressly ratified and continued both by respondent and appellants; and that the respondent having so withdrawn his newspaper from any contest for the selection, there being no other eligible newspaper in the county, the Star of the Cape was again selected to publish the laws; that the appellants received compensation therefor; that the expenses of such publication were small, the profits considerable; and the respondent prays an accounting of the profits and payment to himself of his one-half part of the net profits in accordance with the agreement.

These are substantially the facts as shown by bill, answer, and proofs.

The vice-chancellor, upon the pleadings and proofs, in an oral opinion, determined that the respondent was entitled to recover on the agreement; that there had been a rivalry between them, existing for years; that the agreement of March 8, 1890, was a truce between them; that the construction to be given to the agreement was, that for the two succeeding years mentioned therein, whichever procured the designation for the publication of the laws should perform the work of printing, and divide the net proceeds; that under the evidence this agreement continued without abrogation during the publication of the laws of 1890 and 1891, and that the agreement was still in force in the year 1891; that if the respondent was entitled to anything under it, he was entitled the same for the year 1891 as for the year 1890, and held that the court had jurisdiction of the matter in controversy, and decreed that the respondent was entitled to the relief prayed in the bill of complaint, and referred the matter to a master for an accounting between the appellants and respondent, "to report what, upon such accounting, appears to be due from each party to the other, and also the balance which, upon the said account, shall appear to be due from each party to the other."

From the record, it is rather obscure upon what grounds

the case was discussed in the court of chancery. The appellants on this appeal now contend that this agreement was in contravention of the statute on this subject matter; that it was intended to influence and control the official action of the body having the power and duty to select the newspapers to publish the laws, regardless of the provisions of the statute having reference to the publication in the newspaper of the larger circulation, and regardless of the public benefit to be derived from this provision of the statute, and, therefore, contrary to the provisions and policy of the statute requiring such publication, and contrary to sound public policy, and, therefore, void.

It is not difficult to interpret the statute. It is a fundamental requisite that the laws be notified to the people who are to obey them, and the object of the statute is to prescribe the method of this notification, and, whatever way is made use of, it is incumbent upon "the promulgators to do it in the most public and perspicuous manner": 1 Blackstone's Commentaries, 44.

The public benefit intended by the statutes can only be obtained by the publication in the manner required by the statute, in the newspapers to be selected in accordance with the provisions of the statute, "having reference also to such of them as have the larger circulation."

In this case a due regard of the public welfare required that the governor, comptroller, and treasurer should select the newspapers for the publication of the enactments of the legislature "having reference also to such of them as have the largest circulation."

This was the policy of the law, and it is important to ascertain in what manner, if at all, that agreement contravened this policy of the statute. The nature and object of this contract or agreement between the proprietors of these newspapers are perhaps best stated by the evidence in the case about which there appears to be no dispute. It is clear upon the evidence that between the proprietors of these newspapers there had existed for a number of years a sharp contest in relation to the question which newspaper should be selected to publish the laws enacted by the legislature from year to year. This contest was carried on with much feeling on both sides, and with alternating success, one or the other always being selected.

It is quite clear that this contention grew very embarrass-

ing to themselves and exceedingly annoying, both to the two representatives in the legislature as well as to the members of the body having the power to make the selection.

Both claimed to have the larger circulation. There existed a "bitter contest" over the subject and a constant pressure on the public officials in relation to it.

It is conceded here that both these newspapers belonged to one of the two leading political parties in the county of Cape May.

It is clear under the evidence that this agreement controlled the selection.

Had there been no agreement neither might have been selected, as there is evidence that there was another newspaper in the county seeking the patronage.

The evidence of Mr. Cole, which is not denied but conceded to be a truthful statement of the transaction, shows that the agreement alone caused the selection to be made as it was made.

There is no difficulty whatever in asserting that, so far as appears on the face of this matter, taking the contract along with the evidence, regardless of the question which newspaper possessed the larger circulation, the agreement for a financial consideration between the parties solely influenced the selection made.

The withdrawal of the one party under this agreement, to allay the antagonism and divide the profits, secured absolutely the appointment of the other to this office or patronage.

The contract not being fulfilled between the parties, the question arises, Can it be enforced, or is it so manifestly contrary to public policy, in contravention of the statute, and so injurious to the public good, that it defeats itself?

In determining this there must be kept in view the general rule of law that, where there is no statutory prohibition, the law will not readily pronounce an agreement invalid on the ground of policy or convenience, but is, on the contrary, inclined to leave men free to regulate their affairs as they think proper. Where, however, a contract is of such a nature that it cannot be carried into execution without reaching beyond the parties and exercising an injurious influence over the community at large, everyone has an interest in its suppression, and it will be pronounced void from a due regard to the public welfare: *Fuller v. Dame*, 18 Pick. 472; *Frost v. Inhabitants of Belmont*, 6 Allen, 152, 162.

This is the rule laid down in *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 389.

All contracts entered into fully and voluntarily must be held sacred and be enforced by the courts. Yet they must not be such contracts as are in contravention of the paramount principle of public good: *Egerton v. Earl Brownlow*, 4 H. L. Cas. 235; *Printing etc. Reg. Co. v. Sampson*, L. R. 19 Eq. 462; *Hinnen v. Newman*, 35 Kan. 709.

The principle upon which the courts of justice must go is to enforce the performance of contracts not injurious to society, and it would be absurd to say that a court of justice shall be bound to enforce contracts injurious to and against public good: *Collins v. Blantern*, 2 Wils. 341.

Now, the intention of the contract was to contravene the statute, and this intention is revealed in the contract. This renders the contract vicious and unenforceable. An agreement to contravene a statute in fraud of the public, or to the injury of private parties, savors of a conspiracy. An agreement contrary to public policy is likened by the authorities to a conspiracy. The viciousness of it is in the intention, and once being found to be such the law cannot presume that they are without the effect intended by the parties, in order to confer upon them the quality of enforceability.

Now, it is only upon judicial determination that a contract contravenes the policy of some public statute, or some well-known rule of law, that it is held to be void.

Turning to the judicial decisions upon this subject, we find them so numerous and of such variety that a consideration of them at any length is not practicable. The general principles governing the matter are well established by a long line of authorities, and in the case now before the court they do not appear to be of difficult application.

It has been declared that public policy is a variable quality, but the principles to be applied have always remained unchanged and unchangeable, and public policy is only variable in so far as the habits, capacities, and opportunities of the public have become more varied and complex. The relations of society become from time to time more complex; statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and therefore new applications of old principles are required: *Davies v. Davies*, L. R. 86 Ch. Div. 364.

Whatever tends to injustice or oppression, restraint of lib-

erty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law as to executive, legislative, or other official action, whenever embodied in and made the subject of a contract, the contract is against public policy and therefore void and not susceptible of enforcement.

All contracts prejudicial to the interest of the public, such as contracts tending to prevent competition whenever the statute or any known rule of law requires it, are void: 1 Addison on Contracts, 263.

The statute here was intended to encourage rivalry as to the matter of the circulation of the newspaper intended for selection, and the policy of the statute was the greater benefit to the public in the selection when it declared that the matter of extent of circulation should be regarded, and any contract tending to interfere with the beneficial operation of the statute was unlawful as against the policy of the law: *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 889; *Jones v. Randall*, Cowp. 37; *Blachford v. Preston*, 8 Term Rep. 95; *Mitchell v. Smith*, 1 Binn. 120; 2 Am. Dec. 417. Chief Justice Kirkpatrick, in *Sterling v. Sinnickson*, 5 N. J. L. 756, declared that if the consideration be against public policy it is insufficient to support the contract, and Justice Rossell, in the same case, said: "It is a general principle that all obligations for any matter operating against the public policy and the interests of the nation are void."

There are many illustrations of the application of this principle closely allied to the present case. An agreement to withdraw an election petition in consideration of money was void: *Coppock v. Bower*, 4 Mees. & W. 361. A note executed in consideration of the payee agreeing to resign a public office in favor of the maker and using his influence to appoint the latter's successor is void: *Meacham v. Dow*, 32 Vt. 721. So to the same effect upon a contract of a like nature and quality will be found the case of *Parsons v. Thompson*, 1 H. Black. 322. A note given in consideration of forbearance of bidding at sheriff's sale of real estate was held to be without consideration, on the ground that it was the policy of the law to encourage bidding at sales on execution: *Jones v. Caswell*, 3 Johns. Cas. 29; 2 Am. Dec. 134. The policy of the law encourages free competition, and contracts in avoidance of that

policy are void: *Jones v. Caswell*, 3 Johns. Cas. 29; 2 Am. Dec. 184; *Doolin v. Ward*, 6 Johns. 194; *Thompson v. Davies*, 13 Johns. 112; *National Bank v. Sprague*, 20 N. J. Eq. 160; *Morris v. Woodward*, 25 N. J. Eq. 32. So in relation to contracts to control public officials or electors with an illegal tendency: *Thomas v. Edwards*, 2 Mees. & W. 218; agreements to obtain pardons: *Hatzfield v. Gulden*, 7 Watts, 152; 32 Am. Dec. 750; *Kribben v. Haycraft*, 26 Mo. 396; *State v. Johnson*, 52 Ind. 197; *Haines v. Lewis*, 54 Iowa, 301; 37 Am. Rep. 202; contracts for services known as "lobby services": *Trist v. Child*, 21 Wall. 441; contracts for moneys lent to another to aid him in securing an office: *Meguire v. Corwine*, 101 U. S. 108; contracts for service of a canvasser at a primary election: *Keating v. Hyde*, 23 Mo. App. 555; a promise of reward for influence to secure an office: *Nichols v. Mudgett*, 32 Vt. 546; a promise to pay the director of a corporation to resign: *Guernsey v. Cook*, 120 Mass. 501; *Noel v. Drake*, 28 Kan. 265; 42 Am. Rep. 162; *Forbes v. McDonald*, 54 Cal. 98; assignment of salary not due: *Bliss v. Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273; the unearned half pay of a retired army officer is not assignable: *Schwenk v. Wyckoff*, 46 N. J. Eq. 560; 19 Am. St. Rep. 438; an agreement to renounce an executorship: *Ellicott v. Chamberlin*, 38 N. J. Eq. 604; 48 Am. Rep. 327; an agreement on the part of a caveator to withdraw his opposition to the laying out of a public road: *Smith v. Applegate*, 23 N. J. L. 352.

These are instances of contracts in contravention of sound public policy, and therefore void.

Turning to those cases in which the contracts are charged to be contrary to public policy, because in contravention of the provisions of some public statute or of its policy, we find the illustrations of decided cases just as numerous and varied.

The general rule is, that all agreements or contracts, whether sealed or otherwise, in contravention of statutes, are void (1 Addison on Contracts, 388, sec. 253, and cases cited in note 1), and all contracts in contravention of the policy of an act of the legislature are illegal and void: *Rogers v. Kingston*, 10 Moore, 102; 2 Bing. 441; *Murray v. Reeves*, 8 Barn. & C. 425; *Hall v. Dyson*, 16 Jur. 270; 21 L. J. Q. B. 224; *Hills v. Mitson*, 8 Ex. 758; *Cannon v. Cannon*, 26 N. J. Eq. 316. Contracts having for their object the violation, defeat, or evasion of a statute are illegal and void: *Blasdel v. Fowle*, 120 Mass. 447; 21 Am. Rep. 533; and when the object of the contract is

to obstruct duty by defeating the letter or spirit of the law the courts will not enforce the agreement. It must not contravene the provision or policy of a public law: *Cannon v. Cannon*, 26 N. J. Eq. 316; 9 Am. & Eng. Ency. of Law, 907; and a contract may be illegal, although not in contravention of the specific directions of a statute, if it be opposed to the general policy and intent thereof: *Staines v. Wainwright*, 6 Bing. N. C. 174; *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; *Collins v. Blantern*, 2 Wils. 341; 1 Smith's Leading Cases, pt. 1, p. 680. It is not necessary that the statute should contain words of positive prohibition: *De Begnis v. Armistead*, 10 Bing. 110.

The contract here in question, between the appellants and the respondent, on its face assumes control of the disposition of the selection to publish the laws. It was not within their intention, as appears by the contract and the evidence, that either one of the members of the public body designated by law to make this selection should have the slightest voice in the performance of their duty under the statute. So far as this contract is concerned there might as well have been no existence of any such selecting power or any statute upon the subject. This contract was substituted in the place of the statute, and so far as the contract is to be considered and interpreted the statute no longer had any force or effect. The contract was a subversion of the statute. Regardless of the reason of the statute and the public benefit to be derived from its administration, for the purpose of allaying a personal antagonism between themselves, by their agreement, they dictated to the public body provided by law to administer this statute a course of action without reference to those provisions which designate the objects, purposes, and policy of the legislature in its enactment. No grosser form of a contract in contravention of the provisions and policy of the statute could be demonstrated.

The contract itself and its tendency are the tests of its illegality. The results which are produced are not the proper tests, although here the results are those which are also interdicted by sound public policy. Its tendency was, and the result was, to influence official action regardless of the plain provisions of the statute.

In the case of *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 889, it was agreed that Bailey should give Gulick one thousand dollars on condition that Gulick would forbear to pro-

pose or offer himself to the postmaster-general to carry the mail on a certain mail route. There was no public auction of a contract, nor was the postmaster-general, as the case appeared, bound by statute, except, perhaps, by implication, to award the contract to the lowest bidder. He was bound to advertise for bids, and did so. Bailey and another bid in opposition to each other, and the contract was awarded to Bailey. The agreement was held void as contravening the statute of the United States and against public policy. Any contracts which have for their object the influencing the action of public officials are void as against public policy: *Ayer v. Hutchins*, 4 Mass. 370; 3 Am. Dec. 232; 1 Addison on Contracts, 388, sec. 253, and note 1. An agreement whose object or tendency is to influence any officer of the state in the performance of a legal duty, partially or completely, is void: *Lucas v. Allen*, 80 Ky. 681; *Normack v. Loran*, Ct. App. Ky. 86; *O'Hara v. Carpenter*, 23 Mich. 410; 9 Am. Rep. 89; *Caton v. Stewart*, 76 N. C. 357. It is distinctly held that an agreement for compensation for procuring a contract from the government of our own, or that of another, country is against public policy and void: *Tool Co. v. Norris*, 2 Wall. 45; *Oscan-yan v. Arms Co.*, 103 U. S. 261. An agreement between two candidates for the same office, that one shall withdraw, and the other, if successful in the attempt to obtain the office, shall divide the fees with him, is void as against sound public policy: *Gray v. Hook*, 4 N. Y. 449; *Hunter v. Nolf*, 71 Pa. St. 282; *Osborne v. Williams*, 18 Ves. 379; *Ashburner v. Parrish*, 81 Pa. St. 52; *Gordon v. Dalby*, 30 Iowa, 223. All agreements, for financial consideration, to control or influence the business operations of the government, or the appointment of public officers, are void as against public policy, without reference to the question whether improper measures are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptations by refusing them recognition in the courts: *Tool Co. v. Norris*, 2 Wall. 45. See collection of decisions in note by Hare and Wallace, 1 Smith's Leading Cases, pt. 1, p. 676, etc., down to the year 1866, and a further collection of leading cases in notes to 3 Am. & Eng. Ency. of Law, 875, etc. And so considerations of the same kind, of inferior moment, apply, whenever the necessary or even probable effect of the contract will be to divert any public servant from the path of duty, or cause favoritism or interest to prevail in the

determination of questions which should be examined with a view to the general good and the just claims of the parties in interest: *Satterlee v. Jones*, 3 Duer, 102.

The principles so well established by the authorities as applicable to the contract in question renders a further consideration almost superfluous. The agreement, so far as the action and intention of the parties to it is concerned, prevented the public body having power to select the newspaper from naturally entering upon any inquiry which of the two newspapers was of the larger circulation. The contract was designed for that purpose, and thus influenced that body in favor of one of the newspapers named in the contract to be selected. The selection could only be lawfully made by reference to the newspaper having the larger circulation, and the agreement appears to have been determined upon so that this body of officials should be relieved not only of the legal duty required by the statute, but that the designation or selection should be accomplished without any reference whatever to one of the distinguishing essential elements which should have entered into the selection. This agreement was intended to avoid the act of the legislature. One of the competitors retired from the competition for a financial consideration secured to him by the contract, and the contract under the evidence induced the selection made.

It is in evidence here that there was a possibility that neither paper would have been selected if this agreement had not been made; for either of them to obtain it, this settlement between them became necessary, and by this contrivance their further antagonism was avoided, and thus the beneficial operation of the statute evaded.

This statute must be presumed to have been enacted for the public benefit, and such an interpretation, if possible, should be put upon it to give it this effect, otherwise it is wholly bad, and it is the policy as well as the plain provision of the statute that the newspaper should be selected having the larger circulation, and any contract contravening that policy is void, whatever may be the results. The statute had in view the greater publicity of the laws. The contract had in view the mere private interests of the parties to it.

Now the plan of the legislature for the selection of the newspapers gave no sanction to the contention that the selection can be made by any other body than the one designated by law to make it, or that the selection can be made by agree-

ment between the publishers of such newspapers as may be eligible for selection, whether the purpose be to relieve the officers of the law from some embarrassing situation of a political nature or with proper or improper motives. The tendency to this result must be avoided, and therefore if the power of selection be vested in public officials, any agreement between those in competition for selection which in anywise has a tendency to interfere with such selection in the manner in which the selection is to be made according to the statute, for public benefit, is certainly unenforceable at law or in equity. Such candidates for selection are to abstain from such influence, and allow the selection to take its natural and legal course under the law.

The mere political right of either of the parties or the selecting power can have no consideration, except as embodied in the statute. The division of the publication between newspapers of different political parties was made that the public might be more universally reached, and so was the qualification that reference should be had to the larger circulation. The theory of the legislature was that it was for the public benefit, and not either a political or other emolument, to the newspaper selected for such publication. There was a public service to be performed, both by the body making the selection and by the persons selected, and that public service, under the limitations of the statute, was the only consideration which should have been regarded.

Such an agreement as the one now under consideration must result in a detriment to the public, if the consequences be no worse. It is simply, in plain language, a financial bargain between two seekers after public position to get one or the other out of the way, so that the other may succeed in obtaining it, and it certainly comprehends within its terms the direct and positive interference with the ordinary and just administration of the law by those whose duty it was to subserve the public good in the execution of the law, and it must be held illegal and void because contrary to both the provisions and policy of the statute, and as tending improperly to influence official action. These arrangements are not interpreted and enforced by mere final results, when by their terms it seems that they are injurious to the public good. We might just as well argue that bribery of the legislator is justifiable, because the law enacted by his vote is beneficial in its character. Public laws cannot be contravened by contracts of

this character, and courts must refuse to enforce their consideration, and the principles of law are salutary which compel the courts to such refusal. Neither a court of equity nor of law must be allowed to enforce contracts which are opposed to maxims of sound policy. The court will not aid either party to an illegal contract, but will leave the parties where it finds them.

The decree of the court of chancery must be reversed.

CONTRACTS IN CONTRAVENTION OF STATUTE VOID AS AGAINST PUBLIC POLICY.—A contract designed to defeat the policy of a statute is void: *Gulick v. Ward*, 10 N. J. L. 87; 18 Am. Dec. 389, and notes; *Patton v. Gilmer*, 42 Ala. 548; 94 Am. Dec. 665, and note; *Linn v. State Bank*, 1 Scam. 87; 25 Am. Dec. 71, and note; *Persons v. Jones*, 12 Ga. 371; 58 Am. Dec. 476, and note; *Gravier v. Carraby*, 17 La. 118; 36 Am. Dec. 608, and note. See also the extended notes to the following cases where the subject is thoroughly discussed: *Bowman v. Phillips*, 13 Am. St. Rep. 297-300; *Woods v. Armstrong*, 25 Am. Rep. 675-678 and *De Leon v. Trevino*, 30 Am. Rep. 106-112. So also a contract having in contemplation the violation of a law of a neighboring state is void: *Graves v. Johnson*, 32 Am. St. Rep. 45, and extended note.

EQUITY—RELIEF, WHETHER GIVEN TO PARTIES IN PARI DELICTO.—A court will not enforce an illegal contract where the parties are *in pari delicto*, but will leave them where it found them: *Bowman v. Phillips*, 41 Kan. 284; 13 Am. St. Rep. 292; *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531, and note; *Capehart v. Rankin*, 3 W. Va. 571; 100 Am. Dec. 779; *Schmidt v. Barker*, 17 La. Ann. 261; 87 Am. Dec. 527, and note. See further on this subject the extended note to *Harper v. Harper*, 7 Am. St. Rep. 587.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

HILL v. UNITED LIFE INSURANCE ASSOCIATION.

[154 PENNSYLVANIA STATE, 29.]

LIFE INSURANCE—TONTINE ASSIGNMENT—PAYMENT TO FIDUCIAL AGENCY.

When a number of members of a life insurance association, each holding a policy in like amount, execute tontine assignments to a fiducial agency in trust to collect and distribute the proceeds of their respective policies, in case of death, to the survivors, such assignments are not wagering contracts but are valid. Upon the death of one of the assignors the payment of his insurance to such fiducial agency is a good payment and relieves the insurer of all liability to the legal representatives of the insured. The right of such representative to recover the insurance money in an action against the fiducial agency, not being before the court, is not decided.

LIFE INSURANCE—WAGERING CONTRACT.—A man may insure his own life, paying the premium himself, for the benefit of another, who has no insurable interest. Such transaction is not a wagering contract.

ASSUMPSIT on a policy of life insurance. The following is the assignment sanctioned by the insurance association and referred to in the opinion.

“TONTINE ASSIGNMENT, No. 168.

“I hereby assign my certificate of membership No. B-5354 for \$10,000 in the United Life and Accident Insurance Association, made payable to myself as sole beneficiary, to the Fiducial Agency, in trust to collect and distribute the proceeds thereof according to the foregoing plan of trust assignments for mutual benefit, which plan, as approved of by the United Life and Accident Insurance Association, I hereby agree to; and also to collect for me my one equal share of each and all certificates included in the same trust assign-

ment. I appoint the Fiducial Agency my attorney in fact, irrevocable for all purposes connected with this trust.

"I hereby nominate my estate of—to be the beneficiary of one equal share of the proceeds of the above-described certificate upon my demise."

Judgment for defendant, and plaintiff appealed.

J. M. Swearingen, McCreery, and Rogers, for the appellant.

Edward F. Hayes, T. A. Noble, and Harry Wilbur, for the appellee.

PAXSON, C. J. There is really but one question in this case, viz: Was the "Tontine Assignment," as it is called, a valid and lawful contract? The plaintiff contends that it was not, for two reasons: 1. The paper is not an assignment at all, and passed no title to the Fiducial Agency; and 2. It is a wagering contract of the worst character, and wholly void.

We cannot assent to either of these propositions. It appears that Laban S. Hooper became a member of the United Life Insurance Association, appellee, a corporation of New York, on October 23, 1890. His policy of insurance was for ten thousand dollars, payable ninety days after proof of his death. The said Hooper, and nine other members of said association, each holding a policy in like amount, then executed certain papers, called the "Tontine Assignment," to the Fiducial Agency, which, as we understand it, was a scheme for the distribution of the proceeds of their respective policies, in case of death, to the survivors.

The first party to the "Tontine Assignment" to die was the said Laban S. Hooper, who died August 10, 1891, intestate, unmarried, and without issue, leaving as his heir at law his mother, the appellant, to whom letters of administration were granted on August 31, 1891.

The defendant company paid the entire proceeds of Laban S. Hooper's policy to the Fiducial Agency on January 4, 1892. The company had previously been notified of appellant's claim to the proceeds.

We think the "Tontine Assignment," so far as it was made for the purpose of creating the Fiducial Agency, a trustee to collect the share of Laban S. Hooper, whatever that share should be, after his death, was a valid assignment. As between this plaintiff and the defendant company, the payment to the Fiducial Agency was a good payment. The question of

the right of the plaintiff to recover in an action against the Fiducial Agency is not before us and is not decided.

It is proper to remark, however, that the cases which have been cited in regard to gambling policies have little, if any, application. The policy in question was not a gambling policy. It was taken out by Mr. Hooper on his own life, and the premium was paid by him. It was held in *Scott v. Dickson*, 108 Pa. St. 6, 56 Am. Rep. 192, that a man may insure his own life, paying the premium himself, for the benefit of another, who has no insurable interest, and that such a transaction is not a wagering policy. This results from the right which a man has to dispose of his own property. In this case he attempted to do so by entering into the tontine arrangement, the effect of which, as we understand it, was to distribute the amount of a policy in case of a member's death among the surviving members. In this respect, it appears to resemble to some extent a conveyance between two or more persons as tenants in common with a right of survivorship. Upon this point, however, we express no decided opinion at present. All we hold is, that the payment by the defendant company to the Fiducial Agency was a good payment as between the defendant company and the plaintiff.

Judgment affirmed.

LIFE INSURANCE—INSURABLE INTEREST.—A man may insure his life and make the insurance money payable to whom he pleases, whether such person has any interest in his life or not, provided there is no arrangement between the parties at the expense and for the benefit of the person designated as beneficiary, as a cover for a mere wagering contract: Extended notes to *Morrell v. Trenton Ins. Co.*, 57 Am. Dec. 102; *Currier v. Continental etc. Ins. Co.*, 52 Am. Rep. 142; and *Bankers' etc. Assn. v. Stopp*, 19 Am. St. Rep. 788. A member of the Ancient Order of United Workmen of New York can legally direct the sum due at his death to be paid to a stranger who has no insurable interest in his life: *Sabin v. Phinney*, 134 N. Y. 423; 30 Am. St. Rep. 681. As to the validity of an assignment of life insurance to one who has no insurable interest in the life of the insured, see the extended note to *Equitable Life Ins. Co. v. Haslewood*, 16 Am. St. Rep. 906.

NORTHWESTERN MASONIC AID ASSOCIATION v. JONES.

[154 PENNSYLVANIA STATE, 99.]

BENEFIT SOCIETIES—WHETHER INSURANCE COMPANIES.—An association not organized to do business for profit or gain, but to pecuniarily aid the widows, orphans, heirs, and devisees of its members, is not an insurance company, and its membership certificates are not contracts of insurance.

BENEFICIAL ASSOCIATIONS—DISTRIBUTION OF MEMBERSHIP FUND.—When a certificate of membership in a benefit society provides that by reason of membership the devisees, or, in case of no will, the heirs, of the member upon his death are to receive a designated sum, and a member holding such certificate dies without children, leaving a will by which he appoints an executor, but without making any bequest of his benefit fund, such fund will be distributed to his legal heirs as designated by the statute of distributions to the exclusion of such executor and the creditors of the estate of the deceased.

LIFE INSURANCE—INSURABLE INTEREST—WHO MAY BE BENEFICIARIES.—A person has such an insurable interest in his own life that he may insure it for the benefit of his heirs, or even for the benefit of a stranger.

BENEFIT SOCIETIES—WAGERING CONTRACT.—A certificate of membership in a benefit society which provides that the devisees, or, in case of no will, the heirs, of the member upon his death are to receive a designated sum, is not a wagering contract.

BENEFIT SOCIETIES—BENEFIT FUND—MEMBER'S INTEREST IN.—Under a certificate of membership in a benefit society which provides that the devisees, or, in case of no will, the heirs, of the member upon his death are to receive a designated sum, the member has no property in the fund during his life. He has only a power of appointment by will. In case of his death without the exercise of such power of appointment, except to name his executor, neither the latter nor the deceased's creditors can acquire any interest in the benefit fund. It must be distributed to his heirs under the intestate law.

BENEFIT ASSOCIATIONS—CONFLICT OF LAWS—DISTRIBUTION OF BENEFIT FUND.—When a member of a benefit society organized under the laws of one state and domiciled therein receives its certificate of membership providing that his devisees, or, in case of no will, his heirs, are to receive a designated sum upon his death, and then dies while domiciled in another state without making a will, the fund to which his heirs are entitled must be distributed to them as provided by the intestate laws of the latter state, unaffected by the laws of the state of the domicile of such society.

J. H. Gendell, Richard P. White, and Joseph P. McCullen,
for the appellants.

Isaac D. Yocum and William B. Crawford, for the appellees.

THOMPSON, J. "The Northwestern Masonic Aid Association of Chicago was incorporated under the general laws of the state of Illinois, and the object of its incorporation was to secure pecuniary aid to the widows, orphans, heirs, and devisees of deceased members of said association." William

D. Jones of Philadelphia, on October 19, A. D. 1885, became a member of this association, and received three division certificates of membership, representing an aggregate of eight thousand five hundred dollars. In these certificates the association agrees and promises to pay the amounts contained in them "to the devisees, or, if no will, to the heirs at law of William D. Jones." On July 23, A. D. 1890, he died, leaving a will by which he devised to his wife the amount of a certain policy of insurance, directed that his estate be converted into cash, and the proceeds be divided between his wife and certain brothers and sisters. Due proof was made to the association of his death, and the amounts contained in the certificates thus became due and demandable. The fund, however, having been claimed by the executor of William D. Jones, deceased, by his widow, and by his brothers and sisters and nephews and nieces, the association filed its bill praying for an interpleader, and for leave to pay money into court. This has been done, and the fund is now for distribution. The executor claimed that it should not be removed from the ordinary course of administration and the demands of creditors, because the contracts were insurances; because heirs as such have no insurable interest, and even if this money had been paid to them it could have been recovered from them by him, and *a fortiori* must be paid directly to him; because the word "heirs" should be construed executor or estate; because the law will not permit the removal of so large a sum from the claims of creditors; and because the executor is a devisee for the purposes of the estate, and the money comes to him under the will.

The purpose of the association was to secure pecuniary aid to the widow, orphans, heirs, and devisees of deceased members of said association. The testator became a member of it, and upon his death the amounts of the certificates were to be paid to his devisees, or, in case of no will, to his heirs. Under the laws of the state of Illinois such an association is not an insurance company. The amendment to the act under which the association was incorporated expressly provides that "associations [such as this one] which are intended to benefit widows, orphans, heirs, and devisees of deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies." The association was not organized to do

business for profit or gain, but was established with a view to pecuniarily aid the widows, orphans, heirs, and devisees of its members. In *Commonwealth v. Equitable Beneficial Assn.*, 137 Pa. St. 412, Justice Clark said: "Such societies are rather of a philanthropic or benevolent character; their beneficial features may be of a narrow or restricted character; the motives of the members may be to some extent selfish; but the principle upon which they rest is founded in the considerations mentioned. These benefits, by the rule of their organization, are payable to their own unfortunate, out of funds which the members have themselves contributed, for the purpose, not as an indemnity or security against loss, but as a protective relief in case of sickness or injury, or to provide the means of a decent burial in the event of death." The association is not an insurance company, nor are these certificates, issued by it in the state of Illinois, contracts of insurance.

The contention that the heirs have no insurable interest, and consequently an executor has a right to the fund, and even if received by the heirs could be recovered by him, has no substantial basis. The certificates provide that by reason of membership the devisees, or, in case of no will, the heirs, are to receive the designated sums. That a person, however, has an insurable interest in his own life, and can insure it for his heirs or even for a stranger, cannot be questioned: *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192; *Bloomington etc. Ben. Assn. v. Blue*, 120 Ill. 121; 60 Am. Rep. 558. These contracts, however, were made in good faith, without any misrepresentation, and in the form prescribed by the laws of the state in which they were made, and they were not wagering contracts in any sense.

It is contended that the word "heirs" should be construed executor or estate. These contracts are specifically made for heirs or devisees. They designate a class, and if the testator had appointed one of such class no question could have been raised as to his right to the fund. If none have been designated the fund must necessarily go to the class. The fund is now in the court, and is for distribution at the domicile of the decedent. The word "heirs," while perhaps inaccurately used, was clearly intended to mean distributees under the intestate law of his domicile. Where the word "heirs" in a bequest of personalty is used, unless a contrary intent is shown, it signifies heirs as designated by the statute of dis-

tribution of decedent's domicile: *Ashton's Estate*, 134 Pa. St. 890; *McKee's Appeal*, 104 Pa. St. 571; *Eby's Appeal*, 84 Pa. St. 241.

The testator had no property in the fund during his life; he had the power to appoint by his will the beneficiaries within a certain class, and it is very clear that the word "heirs" was not intended to include an executor or administrator as among that class.

It was contended also that such a large sum could not be removed from the claims of creditors. When these certificates were issued Jones was not insolvent, and it was not intended by him that any portion of his estate was to be placed beyond the reach of his creditors. In the event of his death the sum specified was to be paid to his devisees or to his heirs. The fund in fact was never his property. He had power of appointment only, and such power did not create any property in him: *Commonwealth v. Duffield*, 12 Pa. St. 279. The purpose of these certificates excludes the claim that there was any property in him. The charter of the association provides that the object of the association shall be to secure pecuniary aid to the widows, orphans, heirs, and devisees, and Jones had simply the power to devise to a person of the class for whose relief the association was organized. The certificates cannot therefore be said to settle property free from his debts.

It was contended that the money is payable to the executor as devisee. The executor is not one of the class of beneficiaries named, and the duty to collect the assets of the estate to pay its debts cannot make him such a devisee. If he were such devisee and received this money it would in fact go to the creditors; but the certificates in question were intended as benefits to the class named, and the funds were thus intended to be placed beyond the reach of creditors: *Mullins v. Thompson*, 51 Tex. 7; *Bown v. Catholic Mut. Ben. Assn.*, 33 Hun, 263; *Catholic Mut. Ben. Assn. v. Priest*, 46 Mich. 429; *Worley v. Northwestern etc. Assn.*, 10 Fed. Rep. 227.

The widow of the decedent claimed the entire fund, because the certificates were executed in the state of Illinois, and under the laws of that state the whole personal estate where there are no children descends to the widow. The bill in this case avers that an application was made by William D. Jones of Philadelphia; the certificates recite they were issued to him in consideration of and in reliance upon the agree-

ments and representations made in the application. They were thus issued to him as a citizen of Pennsylvania, and contained a promise to pay to his devisees or his heirs at law. The fund is to be treated for purposes of distribution as personal property, and as such the contracts manifestly intended that the distribution of it should be according to the intestate law of the domicile of Jones. To hold otherwise would be to declare, in contracts of this kind made in different states, that one person might have shifting sets of heirs. The statute rule of Illinois applies only to persons domiciled in that state. Its common-law rule is, "that personal property has no *situs*, but follows the person of the owner, and is distributed according to the intestate laws of such owner's domicile": *Richards v. Miller*, 62 Ill. 417. As Jones, at the time of his death, had his domicile in Pennsylvania the fund in court for distribution is to be distributed under the intestate laws of this state, and the widow is not entitled to the whole of the fund.

Decree affirmed and appeals dismissed at cost of appellants.

BENEFIT SOCIETIES—DISTINCTION BETWEEN AND INSURANCE COMPANIES.—A contract of insurance is a purely business venture, the characteristic feature of which is the granting an indemnity against loss for a consideration; while the design of benevolent societies is philanthropic. They seek not to indemnify but to accumulate a fund from the contribution of the members to be used in their own aid or relief in case of sickness, injury, or death: *Commonwealth v. Equitable Beneficial Assn.*, 137 Pa. St. 412; *State v. Whitmore*, 75 Wis. 332. See the notes to the following cases where this distinction is discussed at length: *Chartrand v. Brace*, 25 Am. St. Rep. 241; *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 781; and *Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 161.

LIFE INSURANCE—RIGHT TO INSURE FOR BENEFIT OF STRANGER.—A man may insure his own life, paying the premium himself, for the benefit of another who has no insurable interest therein: *Hill v. United Life Ins. Assn.*, 154 Pa. St. 29, *ante* 807, and note with the cases collected; extended note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 787.

INSURANCE—BENEFIT SOCIETY—INTEREST OF MEMBER IN FUND.—The insured member of a mutual benefit society has no interest in the fund. He has simply a power of appointment, which if not exercised becomes inoperative, and in no event does the insurance money become assets of his estate: *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 260, and note. Upon the failure of the member to make an appointment, the fund at his death is distributed to his heirs as designated by the charter and by-laws of the association to the exclusion of his executor and the creditors of his estate: note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 789.

SHEPHERD v. BUSCH.

[154 PENNSYLVANIA STATE, 149.]

PAYMENT—NOTES OF THIRD PERSON—QUESTION FOR JURY.—Whether or not the taking of the notes of a third person by a creditor is intended as absolute payment of the debt or as collateral security merely, is a question of fact dependent upon whether or not an actual agreement to that effect is made by the parties.

PAYMENT—EVIDENCE OF.—When a creditor accepts a certain amount from his debtor in payment of the debt and the remainder in the notes of third persons, a simple receipt given by him to the debtor for the total amount represented by the cash and the notes is some evidence to be considered by the jury that the notes are taken as an absolute payment, but it is very feeble.

PAYMENT—NOTE OF THIRD PERSON.—The mere acceptance by a creditor from a debtor of the note of a third person, to the creditor's order, for a pre-existing indebtedness, is not absolute, but merely conditional payment, defeasible on the dishonor or nonpayment of the note.

PAYMENT—NOTE OF THIRD PERSON.—When the note of a third person is received by a creditor the burden of proving that it was accepted in payment of a debt is upon the debtor.

ASSUMPSIT on a building contract. Busch owed Shepherd \$1,405 balance on a building contract. The former accepted from the latter \$425 in cash and two promissory notes of a third person for \$500 each, they being taken at a discount of two per cent from their face, and gave a receipt for \$1,405. This receipt did not contain anything showing that the notes were taken in absolute payment of so much of the debt, but merely acknowledged the receipt of \$1,405 "on account of contract for plastering." Shepherd recovered a judgment for \$1,069, and Busch appealed.

George L. Crawford and Henry C. Loughlin, for the appellant.

Charles A. Chase and Charles C. Lister, for the appellee.

GREEN, J. The question whether the two notes for five hundred dollars each were taken as absolute payment of that amount of the debt due by the defendant to the plaintiff was a pure question of fact dependent upon whether an actual agreement to that effect was made by the parties. It was, of course, for the exclusive determination of the jury. The learned court below very correctly instructed them as to their duty and as to the character of the question they were to decide. The whole subject was left entirely to them, and they found that the notes were not taken as payment, and an examination of the testimony convinces us that they could not

have done otherwise. The only written evidence submitted by the defendant in support of his contention was the receipt for fourteen hundred and five dollars on account. It is conceded that only four hundred and twenty-five dollars was paid in cash and the remainder was made up by the amount of the notes, as is a very common practice in the business world, when notes or other obligations are delivered in making a payment. But it by no means follows, from the mere fact of a receipt having been given for the gross sum represented by the cash and paper, that the paper is accepted as absolute payment. That depends upon actual agreement. In determining that question the receipt is some evidence and is to be considered, just as the court below instructed the jury in this case. But when the receipt is intended to be proof of an agreement to receive the paper of third persons as absolute payment of that much in money it ought to say so. This receipt says nothing upon that subject, and therefore is very feeble proof in support of such a contention.

The testimony of the plaintiff on the trial is a complete answer to it, if believed by the jury, and the verdict in his favor is conclusive that his testimony was believed.

As to the mere acceptance of the notes, and its effect upon the main question, a single citation from one of our recent decisions is sufficient. In the case of *Holmes v. Briggs*, 131 Pa. St. 233, 17 Am. St. Rep. 804, the present chief justice said, "Nothing is better settled than that in the absence of any special agreement to the contrary the mere acceptance by a creditor from his debtor of the note or check of a third person, to the creditor's order, for a pre-existing indebtedness, is not absolute, but merely conditional payment, defeasible, on the dishonor or nonpayment of the note or check, and in that event the debtor remains liable for his original debt."

In *League v. Waring*, 85 Pa. St. 244, we held that where the draft of a third party is received by a creditor from his debtor for a pre-existing debt, the presumption is that it was received as a conditional payment, unless there was an agreement that it was to be an absolute payment, and the burthen of proving such an agreement is upon the debtor.

There is no merit in the fourth assignment of error, and if there were it is of too trifling effect to justify a reversal on that ground.

Judgment affirmed.

PAYMENT WITH NOTE OF THIRD PERSON—HOW FAR GOOD.—In the absence of any special agreement to the contrary, the mere acceptance by a creditor from his debtor of the check or note of a third person for a pre-existing debt is not absolute, but merely conditional, payment, defeasible on its dishonor or nonpayment: *Holmes v. Briggs*, 131 Pa. St. 233; 17 Am. St. Rep. 804; *Briggs v. Holmes*, 118 Pa. St. 283; 4 Am. St. Rep. 597, and note; *Caldwell v. Hull*, 49 Ark. 508; 4 Am. St. Rep. 64; *Taylor v. Conner*, 41 Miss. 722; 97 Am. Dec. 419, and note; *Berry v. Griffin*, 10 Md. 27; 69 Am. Dec. 123; *Glenn v. Smith*, 2 Gill & J. 493; 20 Am. Dec. 452, and note; *Patapsco Ins. Co. v. Smith*, 6 Har. & J. 166; 14 Am. Dec. 268; *Barrelli v. Brown*, 1 McCord, 449; 10 Am. Dec. 683, and note.

PAYMENT BY NOTE OF THIRD PERSON—BURDEN OF PROOF.—The taking of a negotiable note of a third person for an existing debt is *prima facie* payment, and the burden of proof to the contrary is on the creditor: *Smith v. Bettger*, 68 Ind. 254; 34 Am. Rep. 256; *Whitbeck v. Van Ness*, 11 Johns. 409; 6 Am. Dec. 383, and note; *Gibson v. Tobey*, 46 N. Y. 637; 7 Am. Rep. 397. The delivery of the note of a third person by a debtor to his creditor, drawn to the creditor's order, without indorsing it, does not create the presumption of absolute payment, but the presumption is that the note is collateral security and that the debtor continues liable: *Hunter v. Moul*, 28 Pa. St. 13; 42 Am. Rep. 610.

KING v. PHILADELPHIA COMPANY.

[154 PENNSYLVANIA STATE, 160.]

CONSTITUTIONAL LAW—UNCONSTITUTIONAL STATUTE.—WHEN MUNICIPAL WORK has been done by virtue of municipal authority and in strict conformance with an existing statute, the legality of such work cannot be questioned after its completion because the statute under which it was done has since been judicially declared unconstitutional.

CONSTITUTIONAL LAW—MUNICIPAL WORK COMPLETED UNDER COLOR OF LAWFUL AUTHORITY and an existing statute must thereafter be regarded as lawfully done.

CONSTITUTIONAL LAW—WORK DONE UNDER UNCONSTITUTIONAL LAW.—Acts done by public officers under statutory authority are valid, although such statute is subsequently declared void.

OFFICERS DE FACTO.—ACTS OF OFFICERS *de facto* are invalid when they concern themselves, but are valid when they concern the public or the rights of strangers and third persons who have an interest in the acts done.

CONSTITUTIONAL LAW—ACTS DONE BY DE FACTO OFFICERS UNDER UNCONSTITUTIONAL STATUTE.—Acts performed by officers *de facto* in the exercise of their official functions and strictly within the limits of an existing statute are not illegal although such law is afterwards judicially declared unconstitutional.

BILL in equity to restrain the maintenance of gas-pipes in the streets of a city. Judgment for the plaintiff; defendant appealed.

William, Scott, John, Dalzell, and George B. Gordon, for the appellant.

George W. Guthrie, for the appellee.

GREEN, J. It is not at all questioned that the proceedings for laying out and opening Negley avenue as one of the streets of the city of Pittsburgh were entirely regular and according to law in all respects. An ordinance by the select and common councils of the city was passed July 11, 1887, ordaining and enacting that Negley avenue be located by certain designated courses and distances and of a width of fifty-seven feet. Another ordinance was enacted December 27, 1887, relocating the avenue for a portion of its distance, also by courses and distances expressed in the ordinance. On the 12th of March, 1888, an ordinance was enacted authorizing and directing the city engineer to survey and open Negley avenue from Bryant street, at a width of fifty-seven feet in accordance with the plan on file in the city engineer's office, in pursuance of the ordinance of December 27, 1887. Thereupon viewers, appointed by the court of common pleas of Allegheny county, and authorized by the ordinance of March 12, 1888, proceeded, after due notice to all parties interested, to assess the damages and benefits occasioned by the opening of the street, and made report of their proceedings in that regard, stating the damages they had ascertained to be suffered by property-owners whose lands were taken, and the benefits conferred upon other landowners to whom the opening of the street was an advantage. This report was made on November 17, 1888, and was accompanied by a carefully prepared draft showing the location of Negley avenue from Bryant street to Butler street, with the names of the owners along the line and the boundaries of their several properties, and this draft or plan was duly read and approved in common council on November 26, 1888, and in select council on December 10, 1888. After this was done all the owners who were assessed for benefits, including Alexander King, the father of the present plaintiffs, paid into the city treasury the several amounts assessed against them, and the city thereupon paid to all the property-owners who had sustained damages by the opening of the street the full amounts of the sums awarded to them respectively.

The defendant was duly authorized by its charter and by ordinance of the city councils to lay its pipes in and upon

the streets of the city. When they were about to lay them they applied to the chief of the department of public works of the city of Pittsburgh, to receive instructions as to where they should lay their pipes in this part of the city. According to the undisputed testimony before the master, he directed that they should go through, and occupy Negley avenue for that purpose, assuring the defendant that the street was opened, and that they could occupy it for that purpose. In pursuance of this instruction they surveyed and located the line upon which to lay their pipes through this street, and did lay them accordingly. At that time no question was raised as to the legality of their action. The constitutionality of the law of June 14, 1887, Public Law, 386, had not then been called in question. The pipes were laid in the fall of 1889 and it was not until January 22, 1891, that a proceeding in the courts was commenced to test the validity of the act of 1887. The report of the board of viewers was never questioned or contested by exceptions, appeal, or in any other manner. The fences crossing the line of the new street were not removed by the city authorities, and the street was not thrown open to travel at the time the defendant laid its pipes, but in all other respects the proceedings for laying out and opening the street were completed and had been so since December, 1888.

It is now objected against the legality of the action of the defendant in laying its pipes, that the city government had no power to proceed in the opening of this street, because the act of 1887 was unconstitutional in certain respects. However this contention might suffice to prevent the city from laying out and opening streets in the future, it does not follow by any means that it will suffice to overthrow such work previously done under color of the authority conferred by the act. If no question of the constitutional power of a city to do municipal work, such as the opening or grading and paving of streets, the construction of drains and sewers, the erection of municipal buildings, the introduction of gas and water works, arises until years have elapsed after such work is done, it could not be tolerated that because the power is ultimately held to have been in excess of the lawful authority of the city, that such streets must be closed and abandoned, or the sewers and drains destroyed, or the gas and water works closed, or the municipal buildings torn down. Such municipal works having been done under color of lawful authority, when no question as to the validity of the authority was

raised, must be regarded as lawfully done. The opening of a street ordinarily is followed by the erection of buildings on both sides, by the laying of gas and water pipes, and the construction of sewers. If, after all this has taken place, it is discovered and judicially decided, that the law under which the municipal authorities have acted in the premises is unconstitutional, surely it cannot be that all the improvements, works and buildings, carried on and constructed under apparent legal authority, must be abandoned or destroyed.

There is a very well-established principle applicable to such cases, which holds valid the acts done by persons exercising official functions, by virtue of legislative authority, which is subsequently declared void. Thus in *Clark v. Commonwealth*, 29 Pa. St. 129, where a person had been convicted of murder in the first degree, and had pleaded to the jurisdiction of the court that tried and sentenced him, that the presiding judge had not been lawfully elected under the provisions of the constitution, we held that the title of the judge to his office could not be called in question by a private suitor, but only by the commonwealth, that he was a judge *de facto*, and as against all parties but the commonwealth a judge *de jure* also. It was said by Mr. Justice Woodward, in delivering the opinion, that, "the notion that the functions of a public officer, or of a corporation existing by authority of law, can be drawn in question (I do not mean as to the mode of their exercise, but as to their right of existence), except at the pleasure of the sovereign, is a mistake that springs from the too prevalent misconception that it is the duty of everybody to attend to public affairs."

In *Campbell v. Commonwealth*, 96 Pa. St. 344, in an indictment for arson, a question was raised in this court as to the title of the two associate judges to their office under the constitution of 1874. The defendants were convicted and sentenced, and in this court they claimed that the oyer and terminer which sentenced them was not a legally constituted court, but we declined to entertain the question, on the ground that the associates were judges *de facto*. Mr. Justice Mercur said: "Under due forms of law they hold their offices by title regular on its face. They are performing the duties thereby imposed on them and enjoying the profits and emoluments thereof. Thus they are judges *de facto*, and as against all parties but the commonwealth are judges *de jure*. Having at least a colorable title to these offices their right thereto can-

not be questioned in any other form than by a *quo warranto* at the suit of the commonwealth."

In *Keyser v. McKissan*, 2 Rawle, 139, the action was brought by the commissioners of a county against the county treasurer and his sureties on the treasurer's bond, and it was alleged in defense that the plaintiffs had never taken the oath of office required by law, and were therefore disqualified to act in their official capacity, or to maintain the action. Rogers, J., conceding that the oaths were never taken, said: "The rule which governs the case is, that the commissioners who appointed the treasurer were officers *de facto*, since they came into their office by color of title. It is a well-settled principle of law that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done: *People v. Collins*, 7 Johns. Rep. 554; *King v. Lisle*, Andrews, 163. And this rule has been adopted to prevent a failure of justice. . . . The reason given for the rule is most satisfactory. That the act of an officer *de facto* where it is for his own benefit is void, because he shall not take advantage of his want of title, which he must be cognizant of; but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good: *Cro. Eliz.* 699; *King v. Lisle*, Andrews, 163; *Hippisly v. Tucke*, 2 Lev. 184."

In *Riddle v. Bedford County*, 7 Serg. & R. 386, this court said, Duncan, J.: "There are many acts done by an officer *de facto* which are valid. They are good as to strangers, and all those persons who are not bound to look further than that the person is in the actual exercise of the office, without investigating his title."

To the same effect are *Kingsbury v. Ledyard*, 2 Watts & S. 41; and *Gregg Tp. v. Jamison*, 55 Pa. St. 468.

Applying these principles to the present case it will be seen that the proceedings for the extension and opening of Negley avenue were conducted in a regular and orderly manner, by the select and common councils of the city of Pittsburgh, who were officials in the actual exercise of their functions. One of the instrumentalities employed was the board of viewers, who were also the properly constituted officers for that purpose, according to the law supposed to be applicable to the case. These several officials, acting in their official capacity, carried through to completion all the proceedings necessary to the extension and opening of the avenue for public use.

The councils in their official capacity gave consent to the occupancy of the avenue by the defendant for the purpose of laying their pipes. The chief of the department of public works, the proper officer for that purpose, not only gave consent, but gave directions to the defendant to occupy Negley avenue in laying its pipes. All of these officials held their offices, and exercised their functions, so far as the proceedings in regard to the extension and opening of Negley avenue were concerned, in strict conformity with the law as it was written. With those proceedings the defendant had nothing to do, but, acting in perfectly good faith, so far as appears upon this record, did the acts complained of in the plaintiff's bill in the matter of laying their pipes. In our opinion it is not practicable to hold that their acts in the premises were entirely illegal and void. They were not responsible for the law as it stood, nor were they responsible for errors or defects, if there were any, in the exercise of the official functions of the several city officials. They had a right to assume that the officials whose action was involved were legally constituted officials, with full power to do just what they did do, with regard to the subject of the present contention.

Nor, even if there were some defects in the manner in which the pipes were laid, would those defects suffice to invalidate the entire action of the defendant in laying their pipes. The defendant can easily be compelled to relay any portions of its pipes which are defectively laid. We do not consider that any question of estoppel arises against the plaintiff by reason of the payment by him of the assessed benefits. We decide the case upon the ground that there was a compliance with the existing law in the laying of the pipes, and that the defendant is not responsible for the law of 1887, or for its want of conformity to the constitution. Acting within the limits of that law, and by the sanction of the properly constituted officials, who were officers *de facto* in the exercise of their official functions, they are protected from an allegation of illegality in their action.

Decree reversed, and bill dismissed at the costs of the plaintiffs.

UNCONSTITUTIONAL STATUTE—ACTS DONE UNDER: See *Dunn v. Mellon*, 147 Pa. St. 11; 30 Am. St. Rep. 706, and note; and especially the monographic note to *Kelly v. Bemis*, 64 Am. Dec. 51.

OFFICERS DE FACTO—EFFECT OF ACTS OF.—The acts of *de facto* officers, so far as they involve the interests of the public or third persons, are valid:

Magneau v. City of Fremont, 30 Neb. 843; 27 Am. St. Rep. 436, and note; *Gorman v. People*, 17 Col. 596, 31 Am. St. Rep. 350; but the acts of such an officer are invalid as to himself: Note to *Hildreth v. McIntire*, 19 Am. Dec. 68. See also the extended note to *Kelly v. Bemis*, 64 Am. Dec. 54.

VANNATTA v. CENTRAL RAILROAD COMPANY.

[154 PENNSYLVANIA STATE, 202.]

CARRIERS—CONNECTING—BEGINNING OF LIABILITY OF.—The liability of a connecting carrier does not begin and the duty of the first carrier is not completed until there has been an actual delivery to the connecting carrier.

MASTER AND SERVANT—CONNECTING CARRIERS—FELLOW-SERVANTS.—When the delivery of goods to a connecting carrier is not intended to take place at a point where two railroads meet, but in the yards of the connecting carrier beyond such point the operation of trains by the delivering carrier in the yards of the connecting carrier is not the performance of a duty required of the latter company. The employees of the two companies in such yards are not fellow-servants so as to relieve the delivering carrier from liability for negligence in injuring an employee of the connecting carrier.

MASTER AND SERVANT—NEGLIGENCE OF CONNECTING CARRIER—FELLOW-SERVANTS.—A car inspector employed by a connecting carrier and at work in its railroad yard is not also the employee of another carrier delivering a car in such yard for transportation by the connecting carrier, especially when the delivery of such car has been completed by placing it upon the siding of the connecting carrier as is customary in the usual course of business between the two companies, and the train hands delivering it have started back, but upon discovering that it is not fully upon the siding, return and move it, thus injuring such car inspector. The employees of the two companies are not fellow-servants, and the delivering carrier is liable for the negligence of its employees.

NEGLIGENCE—WHEN A QUESTION FOR JURY.—If there is reasonable doubt as to the facts or the inferences to be drawn from them, the question of negligence is solely for the jury to determine.

TRESPASS to recover for the death of plaintiff's husband caused by the negligence of the employees of a railroad company. Judgment for defendant, plaintiff appealed.

W. C. Shipman and J. C. Merrill, for the appellant.

Edward J. Fox, for the appellee.

THOMPSON, J. At South Easton the Lehigh Valley Railroad Company has a yard in which are sidings for the reception of its trains. Its yardmaster designates by signals the sidings to which trains are to be sent. The appellant's husband was employed by it as an inspector of cars in this yard. On June 30, 1891, the Central Railroad Company of New Jer-

The councils in their official capacity gave consent to the occupancy of the avenue by the defendant for the purpose of laying their pipes. The chief of the department of public works, the proper officer for that purpose, not only gave consent, but gave directions to the defendant to occupy Negley avenue in laying its pipes. All of these officials held their offices, and exercised their functions, so far as the proceedings in regard to the extension and opening of Negley avenue were concerned, in strict conformity with the law as it was written. With those proceedings the defendant had nothing to do, but, acting in perfectly good faith, so far as appears upon this record, did the acts complained of in the plaintiff's bill in the matter of laying their pipes. In our opinion it is not practicable to hold that their acts in the premises were entirely illegal and void. They were not responsible for the law as it stood, nor were they responsible for errors or defects, if there were any, in the exercise of the official functions of the several city officials. They had a right to assume that the officials whose action was involved were legally constituted officials, with full power to do just what they did do, with regard to the subject of the present contention.

Nor, even if there were some defects in the manner in which the pipes were laid, would those defects suffice to invalidate the entire action of the defendant in laying their pipes. The defendant can easily be compelled to relay any portions of its pipes which are defectively laid. We do not consider that any question of estoppel arises against the plaintiff by reason of the payment by him of the assessed benefits. We decide the case upon the ground that there was a compliance with the existing law in the laying of the pipes, and that the defendant is not responsible for the law of 1887, or for its want of conformity to the constitution. Acting within the limits of that law, and by the sanction of the properly constituted officials, who were officers *de facto* in the exercise of their official functions, they are protected from an allegation of illegality in their action.

Decree reversed, and bill dismissed at the costs of the plaintiffs.

UNCONSTITUTIONAL STATUTE—ACTS DONE UNDER: See *Dunn v. Mellon*, 147 Pa. St. 11; 30 Am. St. Rep. 706, and note; and especially the monographic note to *Kelly v. Bemis*, 64 Am. Dec. 51.

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VANNATTA v. CENTRAL RAILROAD COMPANY.

[154 PENNSYLVANIA STATE, 262.]

CARRIERS—CONNECTING—BEGINNING OF LIABILITY OF.—The liability of a connecting carrier does not begin and the duty of the first carrier is not completed until there has been an actual delivery to the connecting carrier.

MASTER AND SERVANT—CONNECTING CARRIERS—FELLOW-SERVANTS.—

When the delivery of goods to a connecting carrier is not intended to take place at a point where two railroads meet, but in the yards of the connecting carrier beyond such point the operation of trains by the delivering carrier in the yards of the connecting carrier is not the performance of a duty required of the latter company. The employees of the two companies in such yards are not fellow-servants so as to relieve the delivering carrier from liability for negligence in injuring an employee of the connecting carrier.

MASTER AND SERVANT—NEGLIGENCE OF CONNECTING CARRIER—FELLOW-

SERVANTS.—A car inspector employed by a connecting carrier and at work in its railroad yard is not also the employee of another carrier delivering a car in such yard for transportation by the connecting carrier, especially when the delivery of such car has been completed by placing it upon the siding of the connecting carrier as is customary in the usual course of business between the two companies, and the train hands delivering it have started back, but upon discovering that it is not fully upon the siding, return and move it, thus injuring such car inspector. The employees of the two companies are not fellow-servants, and the delivering carrier is liable for the negligence of its employees.

NEGLIGENCE—WHEN A QUESTION FOR JURY.—If there is reasonable doubt as to the facts or the inferences to be drawn from them, the question of negligence is solely for the jury to determine.

TRESPASS to recover for the death of plaintiff's husband caused by the negligence of the employees of a railroad company. Judgment for defendant, plaintiff appealed.

W. C. Shipman and J. C. Merrill, for the appellant.

Edward J. Fox, for the appellee.

THOMPSON, J. At South Easton the Lehigh Valley Railroad Company has a yard in which are sidings for the reception of its trains. Its yardmaster designates by signals the sidings to which trains are to be sent. The appellant's husband was employed by it as an inspector of cars in this yard. On June 30, 1891, the Central Railroad Company of New Jer-

say, whose railroad connects with that of the Lehigh Valley Railroad Company, sent into this yard a mixed train, consisting of box, flat, and coal cars. The men in charge of it were known as a drill crew, and made with it a "flying drill." This is accomplished by putting the train into rapid motion, and, while thus moving, cutting loose the locomotive from it, and by its momentum running it into the designated siding. This was done with the train in question, and its conductor delivered his waybills for it to the yardmaster and train dispatcher of the Lehigh Valley Railroad Company. He then mounted his locomotive; the head brakeman and crew left the train upon the siding, and some of them also mounted the locomotive. It was testified by some of the witnesses that a whistle was blown, and that the locomotive started back to Phillipsburg. Upon the arrival of the train upon the siding, appellant's husband began to inspect its cars, and while so engaged under the second car at the west end of the train the Central Railroad Company's employees, finding that the train had not entirely cleared the siding, returned with their locomotive, and pushed it forward. Appellant's husband was at this time under the bumpers, was unable to crawl out, and was killed.

The learned trial judge held that when the Central Railroad Company of New Jersey took its cars for shipment over the line of the Lehigh Valley Railroad Company to the yards of that company it did that duty by the direction of the officers of the Lehigh Valley Railroad Company, and it did a duty which belonged to it; that while it was the act of the Central Railroad Company it was also the act of the Lehigh Valley Railroad Company, because it was a performance by it of labor by reason of its employment by the last-named railroad company; that the employees of the Central Railroad Company, while so engaged upon the tracks of the Lehigh Valley Railroad Company in performance of a duty of that company, became its employees, and that an injury caused by them, or either of them, to an employee of the Lehigh Valley Railroad Company, by the negligence of themselves, is the negligence of a co-employee, for which there can be no recovery.

The vice of the position lies in the assumption that the point of the connection of the two railroads was the actual place of delivery of the train, and that all that was done between that point and the siding in the yard of the Lehigh

Valley Railroad Company was done in performance of a duty which the latter company was required to do. A connecting carrier is bound to deliver the goods to a succeeding one, or at least be ready to deliver them. It has the right to decline freight not delivered within reasonable times before the departure of trains, or when not delivered at the place designated for the delivery.

"The liability of a connecting carrier does not begin, and the duty of the first carrier is not completed, until there has been an actual delivery to the connecting one": 2 Am. & Eng. Ency. of Law, 869.

In the present case there was no delivery intended at the point where these roads connected with each other, but the place of delivery was upon a designated siding in the yard of the Lehigh Valley Railroad Company, and when therefore the train in question was placed upon the siding so designated, and the train accepted by the latter company, it was then a delivery. This train was placed upon the siding, the waybills were delivered, the crew of the Central Railroad Company in charge of it left it, the engineer of the locomotive whistled, and started to return to New Jersey, as testified by some of the witnesses. The receipt of the train upon the siding, the delivery of the waybills, the leaving of the train by the employees of the Central Railroad Company placed that train in the control of the Lehigh Valley Railroad Company, and was a delivery of the same: *Pratt v. Grand Trunk Ry. Co.*, 95 U. S. 45.

It cannot be said that because the yardmaster designated the siding upon which the train was to be placed, it, from the time of such designation, became that of the Lehigh Valley Railroad Company, and the Central Railroad Company became a mere employee of the first-named company. The yardmaster of the Lehigh Valley Railroad Company indicated where the trains were to be placed upon the sidings by the connecting company. Such designation of a siding did not change in any way the custody or control of the train. The Central Railroad Company's employees remained as such in charge until the delivery of the train upon the siding indicated. It is necessary to have a yardmaster to designate in yards the sidings for the receipt of trains, otherwise such confusion would arise as to practically impede the business of the yard. The designation by such yardmaster did not constitute a delivery to the Lehigh Valley Railroad

Company or an acceptance by it of the train. If it did not, the control of that train did not pass to that company. It follows therefore that the Central Railroad Company while thus moving the train to the siding was not an employee of the Lehigh Valley Railroad Company. It was about making its delivery to that company and was not doing any duty to be performed by the Lehigh Valley Railroad Company. When it placed that train upon the siding, delivered its way-bills to the Lehigh Valley Railroad Company, withdrew its brakemen and conductor from it, whistled and signaled to return its locomotive to New Jersey and started back, it completed its delivery of the train. The learned trial judge therefore erred in holding that the Central Railroad Company of New Jersey while thus hauling the train in question from the connection of the two roads to this point was an employee of the Lehigh Valley Railroad Company.

As to the application of the act of 1868, relating to railroad companies and common carriers, defining their liabilities, etc., the learned trial judge expressed no opinion, because he said it was not necessary under his view of the case to decide the question. As the case must be retried it is proper that the question should be determined. The act provides "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee." In the late case of *Spisak v. Baltimore etc. R. R. Co.*, 152 Pa. St. 283, in which Mr. Justice Mitchell classifies the cases upon this act, in concluding, he says: "The railroad company had delivered the car, its duty in that respect was ended, and its further duty of taking it out had not begun. The intermediate unloading, shifting and weighing the car was the work of the steel company, done for it, on its own land, by its own employees. The connection of the railroad company with the place of the accident by reason of its joint use of the tracks for other purposes was an immaterial circumstance that did not affect the relations of the plaintiff to it, or the work he was engaged in."

It will be observed in that case that the crew had actually delivered the car to the steel company and that although

there was a joint use of the track by the steel company and the railroad company the plaintiff was not within the statute. In the present case, this train of cars having been delivered to the Lehigh Valley Railroad Company, it would follow as in that case that the statute did not apply to the appellant's husband. At the time of the accident he cannot be treated as an employee of the Central Railroad Company. He was not working about its cars or its railroad, but on the contrary was engaged in work about the cars of the Lehigh Valley Railroad Company, and about its track.

It was contended that the present case was within the rulings of *Mulherrin v. Delaware etc. R. R. Co.*, 81 Pa. St. 366, and *Stone v. Pennsylvania R. R. Co.*, 132 Pa. St. 206. It will be found that in the first case one company owned the track and the other had the right of trackage for its cars. There were two railroad companies operating, under an agreement, one track. It was thus substantially the road of each company, and the court held that it was not a question of the extent of the title. It was by reason of the joint agreement the road of the defendant, and this was sufficient to bring the case within the act of 1868. In the second case the plaintiff when injured was working about a train of defendant in charge of its employees. In the present case the Central Railroad Company delivered its train upon the siding in question. The siding was in no sense its road and it was not operated by it. The act of 1868, the act in question, does not apply to the appellant's husband in this case.

The learned trial judge expressed no opinion in his charge upon the subject of contributory negligence. Where there is a reasonable doubt as to the facts or the inferences from them, the question of negligence is a question for the jury. In this case, as there are reasonable doubts both as to the facts as well as to the inferences, the question of contributory negligence with proper instructions is one for the jury.

Judgment reversed and a venire *facias de novo* awarded.

NEGLIGENCE—WHEN A QUESTION FOR THE JURY.—See *Burger v. Missouri Pac. Ry. Co.*, 112 Mo. 238; 34 Am. St. Rep. 379, and note with cases collected.

MASTER AND SERVANT—WHO ARE FELLOW-SERVANTS—DEFINITION.—All who are servants of a common master, engaged in the same general business, subject to the same general control and paid out of a common fund, are fellow-servants: *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47, and note; *Murray v. St. Louis etc. Ry. Co.*, 98 Mo. 573; 14 Am. St. Rep. 661, and note.

CARRIERS—CONNECTING—WHEN LIABILITY OF ONE CARRIER AND THE NEXT BEGINS.—See the extended notes to *Wells v. Thomas*, 72 Am. Dec. 237 and *Lenisville etc. R. R. Co. v. Weaver*, 42 Am. Rep. 684. The last of several common carriers forming a connecting line cannot be held for the negligent loss of goods by a prior carrier of the same line: *Lowenberg v. Jones*, 56 Miss. 688; 31 Am. Rep. 379. The liability of a connecting carrier begins where loaded cars are switched off by a former carrier on a sidetrack of the latter's road for immediate transportation: *Alabama etc. R. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173.

HIBERNIA BUILDING ASSOCIATION v. McGRATH

[154 PENNSYLVANIA STATE, 296.]

BAILMENTS—A GRATUITOUS BAILEE IS LIABLE only for fraud or such gross negligence as amounts to fraud.

BAILMENTS—GRATUITOUS BAILEE—OFFICER IN CORPORATION.—A treasurer or director in a corporation may become a gratuitous bailee by serving without compensation and liable only for fraud or gross negligence amounting to fraud.

BAILMENTS—GRATUITOUS BAILEE—TREASURER OF BUILDING ASSOCIATION receiving no pay for his services, though giving a bond for their faithful performance, is a gratuitous bailee, and is not liable for the loss of money paid by him in good faith for stock withdrawals, without an examination of the minutes of the association to ascertain if the board of directors had acted upon such withdrawals, when the order upon which the money is paid is drawn in the usual form, signed by the president and payee, and attested by the secretary, as required by the by-laws of the association; nor does it make any difference that he pays the money to such secretary instead of the payee named, if he has no reason to suspect his dishonesty, and it is usual and customary to pay such money to him for the members of the association.

Theodore F. Jenkins, for the appellant.

John G. Johnson, James M. Beck, and William F. Harrity, for the appellee.

THOMPSON, J. This action was brought by appellee against appellant, who was its treasurer, to recover from him the amount of certain alleged payments made by him to the secretary of the appellee and embezzled by him. The ground of liability was negligence in making these payments, although made upon orders signed by the president and secretary, who also attested the signatures of the payees. The money was either paid in cash to the secretary or by checks payable to his order. Under the by-laws the president was required to sign all orders drawn upon the treasurer for appropriations made by the board, the secretary to keep accurate minutes,

to attest all orders drawn on treasurer for appropriations made by the board, the treasurer to pay all orders drawn on him by order of the board if signed by the president and attested by the secretary. The orders upon which these payments were made were in the usual form, and signed by the president and attested by the secretary. The appellant having no reason to suspect or doubt the integrity of either the president or the secretary, and acting in good faith, paid them. As the appellant served without compensation for his services he became a gratuitous bailee, and as such is to be held liable for gross negligence only. In *Tompkins v. Saltmarsh*, 14 Serg. & R. 275, it was said: "Tompkins is charged as the bailee of Saltmarsh on an undertaking to perform a gratuitous act, from which he was to receive no benefit and the benefit was solely to accrue to the bailor, in which case the bailee is only liable for gross negligence, *dolo proximus*, a practice equal to a fraud." This rule thus stated is repeated in *Scott v. National Bank*, 72 Pa. St. 471; 13 Am. Rep. 711; *First Nat. Bank v. Graham*, 79 Pa. St. 117; 21 Am. Rep. 49. His designation as treasurer did not change the character of the bailment. As provided in the by-law, the money was deposited with him to be paid out when required upon orders drawn in the manner as stated. A treasurer or a director may become a gratuitous bailee, and his official position and designation will not in any degree change his liability as such bailee. In *Swentzel v. Penn Bank*, 147 Pa. St. 153, 30 Am. St. Rep. 718, it was held that directors who are gratuitous mandatories were only liable for fraud or such gross neglect that amounts to fraud. In this case the appellant had no office or place in which as treasurer he transacted the business of the association. When orders were to be paid he testifies he would get notice from the secretary to come down and see him, that he had some that he wanted paid, and that he would go to the secretary's store and would there pay them to him. The appellee's business was managed principally by its secretary, who came in contact directly with its members. In view of the by-law and the modes of payment, it is very clear that he was a gratuitous bailee, and is to be held only to that diligence required as such. It is true he gave a bond as required by the by-law for the faithful performance of his duties, but that did not change the duty cast upon him by law as a bailee. The condition of the bond was that he should perform and discharge the duties of the office,

and shall keep a just and true account of the moneys received, and shall pay to his successor the moneys received, and shall account for the money so received. The condition of the bond therefore was that he should faithfully perform the duties in regard to the bailment that the law required him to perform.

It is, however, contended that, as the bond provides that he shall discharge all the duties now required or may hereafter be required of him as treasurer by the constitution, charter, by-laws, rules, and regulations of said association, and as the board passed a resolution that all applications for withdrawals of stock must be approved by the board of directors at regular or special meetings of the association before payments are made, the appellant was guilty of negligence without examining the minutes and without satisfying himself that the board had acted upon the withdrawals for which the orders in question purported to have been drawn. It is established by the proofs that no entries were made upon the minutes for application of withdrawals after 1884. In point of fact the secretary after this date kept no record in his minutes of any withdrawals. The duty of the president is to preside at all meetings of the board, and to sign all orders for appropriations authorized by the board; that of the secretary is to keep accurate minutes of all meetings of the board, the accounts of the association, and to attest all orders on the treasurer for appropriations of the board. These orders in question were signed by the president, and were attested by the secretary in the usual form. The president was and is still regarded as an upright man; the secretary was also at this time so regarded; the association trusted both of them implicitly, and had no reason or cause to doubt them. If it treated them thus, it was natural that the appellant should in no manner suspect or doubt them. These orders therefore came to him with the certificate of the presiding officer, whose duty it was to preside at all meetings, and with the attestation of the secretary, whose duty it was to keep all records of the meetings. If the appellant had gone to the secretary he would doubtless have been assured that the board had acted upon these withdrawals, and having been so advised he would have been justified in paying them. It can be scarcely said to be want of ordinary diligence to have paid these orders under these circumstances and with these signatures. They were in fact as express an authorization as if he had seen these officers officially. It was said in *Swentzel v.*

Penn Bank, 147 Pa. St. 153, 30 Am. St. Rep. 718: "Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier, and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high. They were the trusted agents of the corporation." The appellant was not guilty of negligence in trusting the secretary, and in putting full faith in his action and that of the president in signing and sending to him the orders in question.

It is, however, argued that the negligence of the appellant consisted in paying the amounts to the secretary and not to the payees named in the order. If these payments were unusual or exceptional there might possibly be some force in the suggestion; but the business of building associations is not carried on with the exact precision of banks in regard to payments. It is uncontradicted that generally orders were paid sometimes at the association if the persons came there, but at other times, if not convenient to these persons to be present at the meeting, they would request the treasurer as a favor to pay them at the secretary's office, and the appellant states that at times he went to the store of the secretary, saw him, and, if orders were to be paid, paid them to him. It was thus usual and customary to pay the money to the secretary for the members. The reason of it was that the secretary, being the active manager of the association, came in constant contact with them, received money from them, and paid money to them. It cannot be, therefore, said that there was negligence in paying the money under these orders to the secretary, with the signatures of the president, attested by the secretary.

In view of the good faith shown by the appellant, and in view of the fact that the testimony in this case does not show negligence that would render him liable, the sixth assignment of error, "That under all the evidence the verdict should be for defendant," is sustained, and the judgment is reversed.

BAILMENT—LIABILITY OF GRATUITOUS BAILER.—Bailees without reward are bound to slight diligence only, and are not answerable except for gross neglect: *Knowles v. Atlantic etc. R. R. Co.*, 38 Me. 55; 61 Am. Dec. 234, and note; *Beardslee v. Richardson*, 11 Wend. 25; 25 Am. Dec. 596, and note; *Tuncil v. Seaton*, 28 Gratt. 601; 26 Am. Rep. 380, and note; *Coal Co. v. Richter*, 31 W. Va. 858; *Burk v. Dempster*, 34 Neb. 426. A mere depositary without any special undertaking and without reward is not answerable for the loss of the goods deposited, except in case of gross negligence: *Foster v.*

Essex Bank, 17 Mass. 479; 9 Am. Dec. 168, and note; *Lloyd v. West Branch Bank*, 15 Pa. St. 172; 53 Am. Dec. 581, and note; *Spooner v. Mattoon*, 40 Vt. 300; 94 Am. Dec. 395, and note; *Roselle v. Rhodes*, 116 Pa. St. 129; 2 Am. St. Rep. 591. See also *Swenmel v. Penn Bank*, 147 Pa. St. 140; 30 Am. St. Rep. 718.

WODDROP v. WEED.

[154 PENNSYLVANIA STATE, 307.]

TRUST PROPERTY EMBARKED IN TRADE IS PRIMARILY LIABLE TO CREDITORS for debt, and will be applied as far as it will go to such liabilities.

TRUST ESTATES—INSOLVENCY OF—RIGHTS OF CREDITORS—PREFERENCES.—

When a trust estate embarked in business under a power contained in a will has become insolvent, and the trustee is also insolvent, he becomes a trustee for its creditors, and as such is bound to protect all their rights and preserve the estate for distribution among them according to their respective rights. He has no right to give a preference to any of them.

TRUST ESTATES—INSOLVENCY OF—PREFERENCES BY CONFESSION OF JUDG-

MENT.—When a trust estate embarked in business under a power in a will has become insolvent after the rights of creditors have intervened, the estate should be held intact for distribution amongst them according to their respective rights. The trustee has no right to confess judgments with intent to prefer certain creditors. Such judgments are void. The unpreferred creditors have a right in equity to compel the trustee and the preferred creditors to account.

TRUSTS—RIGHT OF TRUSTEE TO DELEGATE HIS POWERS.—The duty and power of a trustee cannot be delegated unless there is express authority for that purpose given in the instrument creating the trust.

TRUSTS—DELEGATION OF POWER BY TRUSTEE—ASSIGNMENT FOR BENEFIT

OF CREDITORS.—When a trust estate embarked in business under a power contained in a will has become insolvent, the trustee has no right to execute an assignment of such estate for the benefit of creditors.

CREDITOR'S bill for an account by a testamentary trustee. Judgment for plaintiff, and defendant appealed.

W. D. Crocker, Rodney A. Mercur, Addison Candor, C. L. Munson, and J. C. Hill, for the appellant.

S. T. McCormick, Henry C. McCormick, and Henry W. Watson, for the appellees.

THOMPSON, J. F. R. Weed, who died April 1, 1882, by his will devised all his property, real and personal and mixed, whatsoever the same may be and wheresoever the same may be, to his brother, Mills B. Weed, in trust nevertheless for the following uses and purposes, to wit: That he shall possess, hold, and manage the same, and conduct, carry on the business and trade, barter and buy, and sell and do all things

that may appertain to said estate, its business or its products, and make such investments and purchases for the property, real and personal, as he may deem for the best interests of the property. If he shall deem it judicious to do so he is authorized to make sale of any part or parts of the estate hereby devised, and give title therefor, and with proceeds of such sale he is authorized to make such investments, and generally to do such acts and things incident to the carrying on of the business for the benefit of the *cestuis que trust* hereinafter named as he may deem judicious. That said Mills B. Weed, in consideration of the services rendered by him, shall receive a reasonable support out of the trust funds for personal services rendered. The trust was to continue during life of Mills B. Weed. After deducting all the expenses he was directed to pay out of the net income annually to the testator's wife one-fourth, the wife of Mills B. Weed one-fourth, to his son one-fourth, and one-fourth to the education of the children of Mills B. Weed and Mary Weed.

At the time of the death of F. R. Weed he was engaged in conducting a banking business as F. R. Weed and Company, a lumber business in firm name of Weed and Allen, and also did business at Trout Run, having a country store there. Mills B. Weed, as trustee of the estate thus devised, continued these several branches of business in which the testator had been engaged. While thus conducting these businesses the trust estate became insolvent, and the master finds as a fact that Mills B. Weed was also insolvent. While the estate was thus insolvent Mills B. Weed, as trustee, and in the name of Weed and Allen, on March 16, 1891, executed and delivered to J. J. Crocker, in trust, a promissory note for seventy-six thousand seven hundred and fifty-eight dollars and seventy-one cents, with a warrant of attorney to confess judgment thereon, and on March 17, 1891, judgment was entered thereon. On March 16, 1891, said Weed, as trustee, and in the name of Weed and Allen, executed and delivered to the First National Bank of Owego, New York, another promissory note for twenty-five thousand dollars, with warrant of attorney to confess judgment, and on March 17, 1891, judgment was entered thereon. On March 17, 1891, executions were issued on these judgments. On March 19, 1891, said trustee executed and delivered to J. J. Crocker and J. Clinton Hill a deed of assignment of all property of said estate in trust to pay the creditors.

Two questions arise in this case, whether the said trustee, the estate being insolvent, could, by confessing the judgments in question, enable the persons to whom they were given to obtain a preference over other creditors of the trust estate, and whether the trustee had any authority to execute the deed of assignment of the trust estate for the benefit of its creditors.

The business of F. R. Weed, deceased, was continued by Weed as trustee for the estate. The character and nature of the different kinds of business required large credits. The basis of a banking business is necessarily credit. That of the lumbering business, by reason of the magnitude of the operations, demands a resort to credit, and that of a large country store, almost by necessity, requires extensive credit. These credits thus required in the business were obtained by the trustee in conducting the same, and the creditors, upon the faith of the trust estate, gave them. The trustee so dealt with them for the trust estate, and his authority to do so was contained in the will creating the trust. He was authorized by it to conduct and carry on business and trade, barter, buy, and sell in and for all things that pertain to said estate, its business or its profits. As a trustee he had complete power to deal with the trust estate to any extent that he might deem for its best interests in obtaining credit for the conduct of the business. Occupying this position of trust, and dealing with the trust estate, the creditors dealt with him. While the wife and the others are named in the will as *cestuis que trust*, there came into existence, by reason of the power of the trustee, the estate embarked in trade, the credit given the trust estate in the business, a class of persons whom equity, in case of insolvency, will protect by the preservation of the trust property from destruction or dissipation. This equity has its foundation in the estate which is embarked in business and to which credit has been given. "Trust property which has been embarked in trade is primarily liable to creditors for debt, and will be applied as far as it will go to the liabilities": Hill on Trustees, 4th ed., *443. *In re Garland*, 10 Ves. Jr. 110, it was said by Lord Chancellor Eldon: "Next, it is admitted they (the creditors) have the whole fund that is embarked in the trade, and in addition they have the personal responsibility of the individual with whom they deal, the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate embarked in trade."

In *Mathews v. Stephenson*, 6 Pa. St. 496, it was said: "We

cannot doubt but that it was the intention of the grantor to give the power of contracting debts upon the credit of the fund or property. Such power would seem to be necessarily implied in a general power to carry on a store; more especially as he expresses the most unbounded confidence in his son, who was the trustee, and that he would conduct the whole business for the benefit of the beneficiaries and of the objects of the grantor's bounty. It would be monstrous to hold that the trustee and the agent himself, altogether without property as appears from the deed of trust, should be allowed to carry on business on the strength of the trust property, according to the custom of the country, and then permit him or anyone else to allege that the trust property was not liable because he was not expressly authorized to contract debts in so many words. The stock of the beneficiaries was repaired and renewed by these debts contracted; they got the benefit of them, and the trust property ought to be liable." In *Baskins' Appeal*, 34 Pa. St. 272, it was said: "As the trust funds in his hands are by the terms of the deed charged with the remaining debts incurred by Thomas Stephenson under the power granted to him by that instrument, Mr. Baskins is a trustee, and liable to account as such to the creditors of the trust; but it is in his capacity as trustee that he is to account, and therefore the proper place to file and settle his account is in the court of common pleas, and not in the orphans' court."

The trust estate is primarily liable for the debts contracted upon the faith of it. As it is insolvent, and the trustee, as the master finds, is also insolvent, he became a trustee for its creditors. As such he was bound to protect all their rights and preserve the trust estate for distribution among them according to their respective rights, and had no right to give a preference to any of them. The estate being insolvent all of its creditors stood upon an equality, and a creditor who has received a judgment for the purpose of liquidating the amount of his claim has no right to enforce said judgment by execution to the destruction of the estate or the rights of other creditors. The master found "that in the confession of these judgments that the trustee intended that J. J. Crocker and the First National Bank of Owego should be preferred out of the assets of the estate in his hands as trustee, and that they accepted such judgments with the intent to obtain such preferences, and by issuing executions on same and

making a levy upon the personal property to the exclusion of the appellee and other persons interested."

The purpose of the trust was to conduct and carry on the business, and by the insolvency of the estate this purpose was at an end. Such being the case, the duty of the trustee was to file his account and terminate the trust by the distribution of its assets among the creditors pro rata. Instead of doing this, he, after the doors had closed upon the business, with intent to prefer and transfer a large portion of said estate to Crocker and the bank, confessed these judgments to them, and they accepted them with the intent to accomplish that purpose. In violation of a duty cast upon him, it was an attempt on his part and that of these creditors to secure a part of the trust estate to the exclusion of others who stood upon an equality with them, and whose rights were the same. It is not the case of a creditor dealing with a solvent estate and with the right to sue and obtain judgment. It is not the case of a trustee of a solvent estate confessing judgment for a debt due by it. It is not the case of a simple contractual relation with rights that spring from it, but it is an effort of certain creditors, and of a trustee himself insolvent, with a trust estate insolvent, for which debts have been contracted in its business and upon its credit, and whose creditors all stand upon an equality, to destroy that equality by delivering over a considerable part of the estate to such creditors. He was to conduct the business and had no power thus to prefer, as the estate was insolvent. His duty was to prevent any preference among the creditors and to keep the estate intact for distribution among the creditors. Such an attempt on the part of a trustee, because violative of his duties with regard to the estate and of the rights of its creditors and intended to dissipate the trust estate by a preference, should move a court of equity to prevent its consummation, where a bill, as in this case, has been filed by a creditor and on behalf of all others in interest.

It is said that only the *cestuis que trust* named in the will can compel the trustee to file his account, that the creditors cannot do so, and therefore their only remedy is by action at law and by proceedings upon judgments obtained in such action, and that the trustee may waive adverse proceedings and give creditors the preference, which they could obtain by an action at law. In *Brown's Appeal*, 12 Pa. St. 335, the jurisdiction of the orphans' court is considered in regard to testa-

mentary trusts given nominatim, and the conclusion was reached that both the common pleas court and the orphans' court have concurrent jurisdiction. The creditors who thus occupy the relation as shown to the trust estate can compel the trustee to file his account. It is claimed that as the relation between the creditors and the trustee is a contractual one, the trustee had a right to give mortgages or confess judgments. Where the estate however has become insolvent and the rights of creditors have intervened and the estate should be held intact for distribution, a trustee has no right to confess judgments with intent to prefer creditors by giving them the right to issue execution and sell the property: *Mason v. Pomeroy*, 151 Mass. 164.

On March 19, 1891, Mills B. Weed, as trustee, made a deed of assignment to J. J. Crocker and J. Clinton Hill, conveying all the real and personal property of the trust estate to them. In this deed of assignment it is provided that "they shall sell and dispose of the lands, tenements, goods and chattels of the said trust estate of the said Mills B. Weed, trustee, collect and recover all outstanding claims and debts of him the said Mills B. Weed, trustee, due, and with the money arising therefrom, and, after deducting reasonable costs, shall pay the creditors their respective demands if there be sufficient assets to satisfy the whole, and if there shall not be sufficient to satisfy the whole of the just demands of the creditors in full then pro rata according to the amount of their respective demands without preference as between individuals, and should any part of the said trust property remain after complying with the terms aforesaid then said J. J. Crocker and J. Clinton Hill shall deliver over and reconvey the same to the said trustee if he be living."

The duty of the trustee was to conduct and manage the business. It was intrusted to him because of the confidence reposed in him by his brother, and the will did not authorize him to delegate the duty to anybody else. "The duty and power of a trustee cannot be delegated to others unless there is express authority for that purpose given in the instrument creating the trust. It follows therefore that a power to appoint a new trustee can seldom or never exist except in express trusts created by deed or will. The person who creates the trust may make it in whatever form he pleases, he may therefore determine in what event and upon what condition the original trustee may retire and new trustees be substituted":

Perry on Trusts, sec. 287. The estate being insolvent and by reason thereof the trust about to be terminated, this deed was an attempt to transfer to Crocker and Hill all the duties that were cast upon the trustee by the will while at the same time it continues the trust. He had no authority to do so by it. It is no answer to say that this is but a method of payment and that no person but the *cestuis que trust* named in the will could object. The relation existing between the trust estate and the creditors places them in a position to object.

It may be said in conclusion that upon every principle of equity this trust estate should be held intact for the benefit of all its creditors, according to their respective rights, and free from any preferences.

Decree affirmed and appeal dismissed at cost of appellants.

Mr. JUSTICE MITCHELL dissents.

TRUST ESTATES—LIABILITY TO CREDITORS.—A trustee who carries on a mercantile business with the trust assets, for the benefit of the *cestuis que trust* is responsible to the trust creditors not only to the extent of the trust assets but also with his own property: *Connally v. Lyons*, 82 Tex. 664; 27 Am. St. Rep. 935. An action may be maintained by the creditor of a trust estate to reach the trust property in the hands of the trustees without joining the *cestuis que trust*: *Winslow v. Minnesota etc. R. R. Co.*, 4 Minn. 313; 77 Am. Dec. 519. The question as to whether trust estates are subject to execution is discussed in the extended note to *McIlwaine v. Smith*, 97 Am. Dec. 303. As to whether funds in the hands of a trustee are subject to attachment, see *Grooms v. Lewis*, 23 Md. 137; 87 Am. Dec. 563.

TRUSTS—POWER OF TRUSTEE TO DELEGATE POWERS.—The office of a trustee is one of personal confidence and cannot be delegated unless the power to do so is expressly granted in the instrument from which he derives his powers: *Fuller v. O'Neal*, 69 Tex. 349; 5 Am. St. Rep. 59, and note.

TRUSTS—PROPERTY HELD IN TRUST DOES NOT PASS BY AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS BY THE TRUSTEE: *Mannis v. Parcell*, 46 Ohio St., 102; 15 Am. St. Rep. 502.

YOUNG v. WEED.

[154 PENNSYLVANIA STATE, 216.]

TRUST ESTATES—INSOLVENCY OF—CONVEYANCE AND CONFESSION OF JUDGMENT IN FAVOR OF OUTLAWED CLAIMS.—When a trust estate has been embarked in business under a power contained in a will authorizing the executor as trustee to carry on and control such business and if advisable to sell the estate and invest the proceeds for the benefit of the *cestuis que trust*, the trustee has no power, after both the estate and himself have become insolvent, to convey the bulk of it to its creditors whose claims have expired by limitation, and who have knowledge of the terms of the will and of such insolvency, nor can he confess judgment in their favor so as to prefer them over other creditors of the estate. Such conveyance and judgment are void for want of consideration as against the other creditors, and cannot operate as a waiver of the statute of limitations so as to restore the lien of such expired claims.

TRUST ESTATES—FRAUDULENT TRANSFER BY TRUSTEE.—When a trust estate embarked in business under a power contained in a will has become insolvent, all of its creditors, as to the trustee, occupy the position of *cestuis que trust*, and as such are entitled to equitable relief from an illegal and unwarranted transfer of the trust estate made by him to their injury.

CREDITOR'S bill to annul a judgment against, and a conveyance of, a trust estate.

Judgment for plaintiff, and defendants appealed.

C. L. Munson, Rodney A. Mercur, W. D. Crocker, and Addison Condor, for the appellants.

Henry C. McCormick, S. T. McCormick, and Henry W. Watson, for the appellee.

THOMPSON, J. At the time of the death of F. R. Weed in 1882 he was conducting a general store at Trout Run, and a general lumber business and a banking business at Williamsport. By his will he created a trust to continue them. The trustee was Mills B. Weed, to whom for the purposes of the trust he devised all his estate, real and personal. The powers of the trustee over it are clearly set forth in the will creating the trust. The words are: "He shall possess, hold, and manage the same, and conduct and carry on business and trade, barter, buy and sell in and for all things that may pertain to said estate, its business or its products, and make such investments of the property, real, personal, and mixed, as he may deem best for the interests of the trust hereby created, and if he shall at any time deem it advisable or for the benefit of the trust hereby created that the said property hereby devised should be sold or any part of it, then I do hereby authorize and empower him to sell the same, and

make a title to the purchaser in fee simple, and with the proceeds of such sale I do authorize and empower the said Mills B. Weed to make such other investments, real and personal, or commence, conduct and carry on such other business for the benefit of the *cestuis que trust*, hereinafter mentioned, as he may deem most advantageous." As an executor he had no power to sell the real property. As a trustee, however, he had the power and was authorized to do so, if he should deem it advisable or judicious for the purposes of the trust, but in the event of a sale he was required to invest the proceeds in other investments for the benefit of the trust estate. It is very clear that his power to sell was for a consideration, for the purpose of investment, and for the benefit of the trust. At the time of F. R. Weed's death, appellants, George and Frank Truman, held a note of which said F. R. Weed was the maker, dated April 1, 1878, for \$50,000; also one dated May 28, 1878, for \$25,000, upon which there was a credit of \$19,828.24. They also held a note dated December 23, 1890, for \$2,000, of which Mills B. Weed, trustee, was the maker. These appellants took no steps to enforce their lien against the real estate of decedent, but on March 3, 1891, Mills B. Weed, as executor and trustee, by amicable action and confession of judgment, filed March 18, 1891, confessed a judgment against the estate of F. R. Weed, deceased, in favor of these appellants for the sum of \$100,446.15, being the principal and interest of the indebtedness referred to. On March 16, 1891, Mills B. Weed, as executor and trustee, conveyed to these appellants twenty-five pieces of real estate, of which four had been acquired after the death of F. R. Weed. These conveyances covered almost the bulk of the trust estate. The consideration named in the deed was \$95,000, but should have been stated to be \$96,800. This amount was credited on the judgment confessed, and was the only consideration for the deed. When it was executed the trust estate was insolvent, and the master finds as a fact that the trustee was also insolvent.

It is manifest that Mills B. Weed, as trustee, had no power to execute this deed. It was not for the benefit of the trust. It was not executed for the purpose of the trust, and there were no proceeds from it to reinvest. It was not given for a valuable consideration. By the act of February 24, 1834, section 24, Purdon, 525, P. L. 77, it is enacted: "No debts of a decedent, except they be secured by mortgage or judgment,

shall remain a lien on the real estate of such decedent longer than five years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors, or administrators within the period of five years after his decease; or a copy or particular written statement of any bond, covenant, debt, or demand, when the same is not payable within the said period of five years, in the office of the prothonotary of the county where the real estate to be charged is situate." F. R. Weed died in 1882, and these appellants Truman and Brother commenced no action and filed no copy or statement. In 1887, five years having elapsed since the death of the decedent, the lien of their debt upon this real estate conveyed expired, and was discharged by operation of law: *Kerper v. Hoch*, 1 Watts, 9; *Bindley's App.*, 69 Pa. St. 295; *Oliver's App.*, 101 Pa. St. 299; *Clauser's Estate*, 1 Watts & S. 208. As the lien had expired there was, therefore, no consideration for the deed.

It is, however, contended that the confession of judgment and the conveyance in question operated as a waiver of the limitation of the act of 1834. *Wallace's Appeal*, 5 Pa. St. 106, is relied upon to sustain this position. In that case, all the parties, heirs, widow, and administrators, united in an agreement that the claim in question should not be affected by the operation of the statute. It was said in that case: "It is a principle of common application that one upon whom the law confers a benefit may relinquish it provided he in doing so inflicts no injury upon the rights of others." In the present case the lien upon the property in question had expired by operation of law, and Mills B. Weed as trustee held it free from it for the benefit of the trust estate. The estate being insolvent, and the rights of creditors in consequence of it having intervened, he had no right as a trustee to waive the operation of the statute and thus restore the lien. As the title to this property had vested in the trustee free from the lien of this debt, as the rights of creditors to it as part of the trust estate had intervened, a confession of judgment by him as executor could not re-establish this lien that had ceased to exist against it.

It has been ably argued that Mills B. Weed was not a trustee for creditors, and the appellee, having acquired no lien against the real estate at the time of the conveyance, is not in a position to question it. The master finds as facts that the estate at that time was insolvent, and also the trustee was in-

solvent. In this finding, approved by the court below, there was no such flagrant error as to warrant its reversal. The appellee has filed this bill for himself and on behalf of others in interest, and in regard to his claim the master finds: "The nature of the indebtedness of the trust estate to Benjamin F. Young, the plaintiff, is, in opinion of the master, sufficiently shown for the purposes of this cause. Ten thousand nine hundred dollars of it was originally a debt of F. R. Weed, which, a short time after the testator's death, while it was a subsisting lien and valid claim upon all the property of the testator, and consequently upon all of the property of the trust estate, was paid with obligations of the trust estate. It would be hard to conceive of a transaction which more than this should be binding upon the trust estate." The appellee, therefore, is a creditor of the trust estate, and as such entitled to relief. As to the relation which the creditors have to the trust estate, the subject has been fully considered in *Woddrop v. Weed* [the preceding case], and it is unnecessary to repeat the same. It is sufficient to say that the trust estate being liable and insolvent, as well as the trustee, the creditors as to him occupy the position of *cestuis que trust*, and as such are entitled to equitable relief to prevent him from making an illegal and unwarranted transfer of the trust estate to the injury of such creditors: *In re Garland*, 10 Ves. Jr. 110; *Mathews v. Stephenson*, 6 Pa. St. 498; *Baskins' App.*, 34 Pa. St. 272; *Stevenson v. Matthews*, 9 Pa. St. 316.

The deed to appellants refers to the will of F. R. Weed, deceased, and recites fully the trust therein created. The appellants, therefore, are not purchasers without notice, were put upon inquiry and had full notice. It is said in *Garrard v. Pittsburgh etc. R. R. Co.*, 29 Pa. St. 158: "Where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact. So he is supposed to have knowledge of the instrument under which the party with whom he contracts as executor or trustee or appointee derives his power." As the appellants are not purchasers for a valuable consideration, and took the property with full notice, equity will follow it in their hands: *Petrie v. Clark*, 11 Serg. & R. 377; 14 Am. Dec. 636. Such being the case, the decree is affirmed, and the appeals are dismissed at cost of appellants.

Mr. JUSTICE MITCHELL dissents.

TRUST ESTATES—LIABILITY TO CREDITORS.—For a further discussion of the principles involved in the leading case, see *Woddrop v. Wood*, 154 Pa. St. 307, ante, 832, and note.

ON AN ASSIGNMENT OF AN INTEREST IN A TRUST ESTATE the trustee holds the property in trust for the assignee: *Back v. Swaney*, 35 Me. 41; 56 Am. Dec. 681.

JENSEN v. McCORKELL.

[154 PENNSYLVANIA STATE, 323.]

NEGOTIABLE INSTRUMENTS—NOTICE BY MAIL—PRESUMPTION.—A notice of protest and dishonor of a promissory note inclosed in a prepaid envelope requesting its return if not delivered, properly addressed, to the indorser at the place where he regularly receives his mail matter, and deposited in the postoffice, is, in the absence of its return undelivered, *prima facie* evidence of its receipt by him, sufficient to charge him as an indorser.

EVIDENCE—PRESUMPTION OF DELIVERY OF LETTER DULY MAILED.—Depositing in the postoffice a properly addressed prepaid letter raises a presumption that it reached its destination in due course of mail. Such presumption may be rebutted by evidence showing that it was not received, and in the event of any conflict of evidence on this point the question is solely for the determination of the jury.

ASSUMPSIT against the indorser of a note. Judgment for plaintiff, and defendant appealed.

Francis H. Garrett and William Gorman, for the appellant.

Ernest L. Tustin, for the appellee.

STERRETT, C. J. This suit is on a note at ninety days from March 28, 1890, made by Rodger Convery to the order of P. C. Convery, indorsed by him and by the defendant, etc.

It is conceded the note was duly presented to the maker at maturity and protested for nonpayment. The only question was whether defendant was legally notified of the dishonor of the note. Alonzo R. Rutherford, the notary by whom it was protested, testified, in substance, that on the day named he inclosed notice of protest in an envelope addressed to defendant, "Philadelphia Driving Park, Philadelphia," his then place of residence in said city, and mailed the same on that day in the Philadelphia postoffice. He further testified that on the envelope in which he sent the notice the words, "Return to Alonzo R. Rutherford, if not delivered," etc., were stamped, and that said letter was never returned to him. It was also in evidence that the then United States carrier delivery service did not cover "Philadelphia Driving Park," but

those who resided there, including defendant, received their mail matter regularly at the sub-postoffice or station located in that section of the city near defendant's residence.

The defendant denied having received the notice of protest; and his man of business, who was accustomed to call at the sub-postoffice daily once, twice, and occasionally thrice for his employer's mail, and sometimes, in his absence, opening the same, testified that he knew nothing of the receipt of said notice.

No points for charge were submitted to the court by either party. After referring to plaintiff's evidence tending to show that the notice of protest was duly mailed to and received by defendant, and also to defendant's rebutting testimony, the learned judge instructed the jury to find, from all the evidence before them, whether or not the notice was sent and reached defendant's residence or place of business, and, among other things, said: "If it came to either of them it was a sufficient notice within the requirements of the law, if it came within a reasonable time," and that "the date, July 12th, which has been mentioned in the course of the case, would be too late."

Considering the two specifications in their inverse order, we think defendant unjustly complains of the court for "not charging the jury that, under all the evidence in the case, their verdict should be for the defendant." The learned judge was not requested to thus instruct the jury and thereby withdraw the case from their consideration. If such instruction had been asked, in view of the evidence referred to, it would have been error to have given it.

The only other specification is the following excerpt from the learned judge's charge: "The United States government has taken hold of the distribution of the mails, and in the city of Philadelphia, letters deposited in the mail are delivered daily, and where there is upon the back of an envelope a stamp of the name of the person who sends letters, the letters are returned if they are not delivered. Under this condition of things I instruct you there is a presumption when the letter is mailed to the proper address within the city that it is delivered in accordance with the direction."

The plaintiff's evidence, as we have seen, was to the effect that on the day the note was dishonored a notice of protest properly addressed to defendant was deposited in the Philadelphia postoffice. In due course of mail the letter thus deposited by the notary would be promptly transmitted to the

sub-postoffice—in the vicinity of defendant's residence—where he was accustomed to regularly receive his letters and other mail matter. The plaintiff's evidence on that subject was sufficient to warrant the jury in finding the fact of which their verdict is necessarily predicated, viz., that the letter reached its destination—defendant's place of business or residence—by due course of mail, etc.

As we said in *Whitmore v. Dwelling-house Ins. Co.*, 148 Pa. St. 405, 33 Am. St. Rep. 838, it is well settled that the fact of depositing in the postoffice a properly addressed, prepaid letter, raises a natural presumption, founded in common experience, that it reached its destination by due course of mail. In other words, it was *prima facie* evidence that it was received by the person to whom it was addressed; but that *prima facie* proof may be rebutted by evidence showing it was not received. The question is one of fact solely, for the determination of the jury under all the evidence: *Folsom v. Cook*, 115 Pa. St. 549; *Susquehanna etc. Ins. Co. v. Tunkhannock Toy Co.*, 97 Pa. St. 424; 39 Am. Rep. 816; *Huntley v. Whittier*, 105 Mass. 391; 7 Am. Rep. 536; *Briggs v. Hervey*, 130 Mass. 188. In the case at bar that presumption is strengthened by the undisputed evidence that the name and address of the notary were stamped on the envelope covering the notice of protest. So greatly indeed does that fact strengthen the presumption, that it becomes well nigh conclusive. At least it would be entitled to considerable weight in connection with other facts and circumstances in the case.

In view of the evidence, and submission of the questions arising thereon to the jury, their verdict, in favor of plaintiff, by necessary implication, establishes the facts that the notice of protest, properly addressed and mailed to defendant, was promptly transmitted to the sub-postoffice in the vicinity of his well-known residence at "Philadelphia Driving Park," and was there received by him, or some one authorized to receive the same from that office. That is sufficient to fix his liability as indorser.

Judgment affirmed.

EVIDENCE—PRESUMPTION THAT LETTER MAILED REACHED DESTINATION.—The deposit of a letter in the postoffice properly addressed and stamped is *prima facie* evidence that the same was received in the ordinary course of mail by the person to whom it was addressed: *German Nat. Bank v. Burns*, 12 Col. 539; 13 Am. St. Rep. 247; *Pennypacker v. Capital Ins. Co.*, 80 Ia. 56; 20 Am. St. Rep. 395; *Phelan v. Northwestern etc. Ins. Co.*, 113 N. Y. 147; 10 Am. St. Rep. 441, and note, with the cases collected.

NEGOTIABLE INSTRUMENTS—NOTICE OF PROTEST BY MAIL.—See *Cass Nat. Bank v. Shaw*, 79 Me. 376; 1 Am. St. Rep. 319, and note; *Brown v. Jones*, 125 Ind. 375; 21 Am. St. Rep. 227; *Corbin v. Planters' Nat. Bank*, 57 Va. 661; 24 Am. St. Rep. 673, and note, and especially the extended note to *Ransom v. Mack*, 38 Am. Dec. 608.

LANG v. PENNSYLVANIA RAILROAD COMPANY.

[154 PENNSYLVANIA STATE, 342.]

COMMON CARRIERS—LIABILITY FOR LOSS OF GOODS DETAINED BY FLOOD.—

When a railroad train containing several carloads of whisky, in course of transportation, is detained by flood, but is left on the track uninjured, and, while it is so detained, thieves break open the cars and seize some of the whisky in open daylight and in the presence of the trainmen, who make no effort at resistance and then desert the train, after which the remainder of the whisky is destroyed by citizens who have guarded it for some time to prevent it from falling into the hands of lawless men, the company is guilty of negligence and liable for the full value of the goods lost.

COMMON CARRIERS—DETENTION OF TRAIN BY FLOOD—LIABILITY FOR GOODS

STOLEN.—The fact that a railroad train is detained uninjured by flood which furnishes an opportunity for plunder will not relieve the carrier from liability for the loss of goods undergoing transportation and which are stolen in open daylight in the presence of the carrier's employees, who make no effort to resist the thieves or to protect the goods.

TRESPASS for the loss of goods by a common carrier. Judgment for plaintiff, and defendant appealed.

George, Tucker, and Bispham, for the appellant.

Thomas D. Finletter and Leonard Finletter, for the appellee.

WILLIAMS, J. The defendant is sued as a common carrier for its failure to deliver a quantity of whisky shipped over its line of road. The defense set up is, that the whisky was lost in the Johnstown flood. The train was overtaken by the flood, but it was not swept away. After the avalanche of water, caused by the breaking of the South Fork dam, had passed the train was left upon the track, and the cars were uninjured. The track above and below it was injured so that the train could not resume its journey at once, but remained in the same place until the necessary repairs were made. The whisky claimed for in this action was not destroyed by a flood. Part of it was stolen by thieves after the flood subsided, and the rest of it was destroyed by a volunteer guard of citizens who had watched and protected the train during the night following the flood and part of the next day as the

easiest way of keeping it from falling into the hands of the same dangerous class of men who had gotten a taste of it on the previous afternoon. The flood was therefore not the cause of the loss, but the occasion, the opportunity, for its plunder by bad men. The thieves came in the wake of the flood to pick up and appropriate what the more merciful waters had spared. They came to this train and began to force open the doors of some of the cars. The conductor and part, if not all, of his crew came upon the ground at about the same time. They saw an ax being used to open one or more of the cars, but they made no effort to defend the train or drive away the thieves. They did not so much as remonstrate with them or order them away; but, turning their backs, they surrendered the train and its freight to the tender mercies of the vagabonds who had attacked it and went away from the neighborhood. Private citizens came soon after, drove the thieves out of and away from the train, and stood guard over it all night and until the middle of the next day; but the trainmen seem to have had neither part nor lot in the effort to save the property of their employer. The reason was given by one of them while on the witness-stand with a cool, deliberate heartlessness not often met with in the most hardened criminals. He said he did not try to help the citizens save the cars and their contents because he "had no orders to do so." He stood and looked on. He saw the peril of his employer's property. He saw citizens, with no personal interest involved, trying to save it; but he did not help because he "had no orders." Whether he and others like him were cowards shivering with fear in the presence of a few thieves whom unarmed citizens drove away, or were thieves at heart, and in full sympathy with those who were trying to loot the cars that they should have defended, is a matter of no consequence. In either case they neglected their obvious duty. The railroad company was represented in the carriage and safe-keeping of the freight on the train by the men to whom the train had been committed. If they deserted their posts and left the goods uncared for, and they were stolen or destroyed, their employer must suffer for their inefficiency. Under the facts of this case the loss sued for did not arise from inevitable accident or the act of God. It did not result from insurrection or the public enemy. It was not the work of a mob. It was due in part to plain stealing, done in daylight, in the presence of the trainmen,

and without the slightest resistance or remonstrance on their part. For the rest it was due to the action of citizens who, after having guarded what remained for nearly twenty-four hours, destroyed it, when they could no longer keep up their watch over it, rather than see it consumed by the human brutes to whom it had been abandoned by the trainmen.

The court below disposed of this same case properly, and the judgment is affirmed.

CARRIERS—LIABILITY OF—ACT OF GOD.—A common carrier is not liable for the loss of goods destroyed while in his possession by an unprecedented flood amounting to an act of God, such as the "Johnstown flood," in the absence of evidence of want of care on his part: *Long v. Pennsylvania R. R. Co.*, 147 Pa. St. 343; 30 Am. St. Rep. 732, and extended note. See also the extended note to *Norris v. Savannah etc. Ry. Co.*, 11 Am. St. Rep. 362. The liability of a common carrier for the loss of goods caused partly by the act of God and partly by other means is discussed in the extended note to *Wolf v. American Express Co.*, 97 Am. Dec. 409. As to the liability of the carrier where the accident is caused by an act of God, but the carrier is not free from negligence, see *Columbus etc. Ry. Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58, and note; and *Richmond etc. R. R. Co. v. Benson*, 86 Ga. 203; 22 Am. St. Rep. 446, and note.

RICHARDS v. FARMERS AND MECHANICS' INSTITUTE.

[154 PENNSYLVANIA STATE, 449.]

CORPORATIONS, ACTS OF DE FACTO OFFICERS OF are valid as regards the public and third persons.

CORPORATIONS ARE LIABLE UPON CONTRACTS MADE BY DE FACTO OFFICERS THEREOF, although such officers are subsequently ousted from office, on the ground of the invalidity of their election.

ASSUMPSIT upon a contract to erect buildings for an agricultural society, and to recover premiums offered by it. While a board of directors, afterwards declared to have been illegally elected, was in possession of the books and property of such corporation they contracted for certain alterations and additions to its buildings and grounds. They also offered premiums to be contested for at the same fair. The suits of Richards and others under consideration in this appeal are for premiums awarded them at such fair. The suits of Zearfoss and Hilliard and others also considered in this appeal are for material furnished by them in erecting buildings and permanently improving grounds for such corporation, and for its use at such fair. Judgment for the plaintiffs. Defendant appealed.

Edward J. Fox, for the appellant.

Orrin Serfass, Aaron Goldsmith, H. J. Steele, John C. Merrill, and Russell C. Stewart, for the appellees.

PER CURIAM. In accordance with provisions of the act of April 22, 1874, the parties dispensed with trial by jury and submitted the decision of their case to the court.

The findings of fact are clearly stated in the opinion of the learned trial judge, and their correctness is not challenged by any of the specifications of error. The latter are all directed exclusively to some of his conclusions of law. Among other things, he found that the acting, or *de facto*, directors had possession of the books of the corporation defendant, and control of its property, real and personal. Under their management and direction the buildings were put in order, and all necessary preparations were made for holding the fair, including the offer of premiums to exhibitors, etc. They conducted the fair, received proceeds of entrance and admission fees, etc.

He also found that plaintiff exhibited cattle at the fair, paid entrance fee therefor, and was awarded premiums amounting to sixty-four dollars and seventy-five cents, which constitutes his claim in this suit; that for several years before, plaintiff was a stockholder of the corporation and voted at elections for directors, but there was no evidence that he knew of any proceedings pending to oust any members of the board.

In view of these and other facts found and embodied in his opinion the learned judge held that the acts of the *de facto* directors were binding upon the corporation. In that we think he was clearly right. Contracts entered into by a corporation *de facto* are binding after having been executed by either party: 2 Morawetz on Corporations, secs. 750, 752. The act of an officer *de facto* is good whenever it concerns a third person who had a previous right or had paid a valuable consideration for it: Angell and Ames on Corporations, 11th ed., secs. 286, 287, 299. An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons: *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409. Our own cases are to the same effect: *Riddle v. Bedford Co.*, 7 Serg. & R. 392; *McGargell v. Hazleton Coal Co.*, 4 Watts & S. 425. In the latter it

was held that "a corporation may act by means of an officer *de facto* as fully and effectually, as regards the public and third persons, as by an officer *de jure*," in all matters within the scope of the corporation's ordinary business.

The learned counsel for defendant, in a very able and ingenious argument, contended that there is a distinction between *de facto* officers of public corporations and *de facto* officers of private corporations. While such a distinction appears to be recognized in some of the cases cited and relied on by him, we are not convinced that it is sound. The weight of authority, in this country especially, is decidedly against it. In the case of public corporations, the reasons for holding the acts of *de facto* officers binding on the corporations they represent are doubtless stronger than in the case of private corporations; but to some extent at least, they are the same in both, differing only in degree.

We find nothing in the record that requires a reversal of the judgment.

Judgment affirmed.

OFFICERS DE FACTO—VALIDITY OF ACTS OF.—The acts of *de facto* officers are invalid when they concern themselves, but are valid when they concern the public or the rights of strangers or third persons who have an interest in the acts done: *King v. Philadelphia Co.*, 154 Pa. St. 160, *ante*, 817, and note with cases collected. See also extended note to *Kelly v. Bemis*, 64 Am. Dec. 54.

CORPORATION—LIABILITY FOR ACTS OF DE FACTO OFFICERS.—The acts of a director of a corporation are valid so far as third persons are concerned, though he is not possessed of the qualifications required by the by-laws, if his election appears of record, and he has been permitted by the corporation to act as director: *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203. The proceedings of a board of *de facto* directors of a private corporation are presumed regular until the contrary is shown; therefore, when acting under a by-law, they remove an officer it will be presumed that they acted on sufficient grounds until their action is impeached by proof: *State v. Kupferle*, 44 Mo. 154; 100 Am. Dec. 285, and note.

HODNETT'S ESTATE.

[154 PENNSYLVANIA STATE, 425.]

WILLS—CHARITABLE TRUST.—A devise to a pastor of a church will not be deemed charitable merely from the nature of the professional character of the devisee. In the absence of any evidence tending to fasten upon him a trust for either religious or charitable purposes he is entitled to such gift in his own right.

E. H. Flick, for the appellant.

Martin Bell, for the appellees.

STERRETT, C. J. This contention arose in the distribution of ten hundred and fifteen dollars and twenty-six cents, representing net residuary personal estate of Mrs. Ellen Hodnett, who resided in Altoona, and died there, testate, on July 8, 1888. The eighth clause of her will, as originally published, is as follows: "The rest, residue, and remainder of my estate I give and bequeath to the Passionist Monastery at Pittsburgh, Pa." Two days before her decease she executed the following codicil thereto: "Now, 6 July, 1888, as a codicil to the foregoing will, I direct the portion directing my executors to procure a chalice to be omitted from the said will, as I have already purchased one myself; and further I direct that the residue and remainder, if any, shall go to the Franciscan Brothers of Altoona, Pa., and to the pastor of the St. John's R. C. Church of Altoona, Pa., in equal parts or shares, instead of to the Passionist Monastery of Pittsburgh, Pa."

It is conceded that this operated as a revocation of the residuary clause above quoted; and, as to the moiety of the residuary estate thus given to the "Franciscan Brothers of Altoona, Pa.," it is also conceded that the codicil is void, under the provisions of the act of April 26, 1855. The only question is, whether the other moiety, given to "the pastor of the St. John's R. C. Church of Altoona, Pa.," is a personal gift or bequest, in his own right, to Rev. N. J. O'Reilly, the appellant, who at date of the will, and also at the death of the testatrix, was the pastor of said church, or whether it was given to him, not in his own right, but in trust for religious or charitable uses, and therefore void under the act of 1855. The learned auditor, holding that it was a personal gift to appellant in his own right, awarded one-half of the fund to him, and the residue to the next of kin of the testatrix, according to the intestate law; but the orphans' court, sustaining exceptions to the

auditor's report, awarded the whole fund to said next of kin. In this it is alleged there was error, and that is the sole question presented for our consideration.

It is conceded that when the will became operative, by testatrix's death, appellant was the pastor of the church specified in the codicil, and hence the fact that he is the legatee described therein cannot be doubted.

There is nothing in the will to indicate that the bequest is, or was ever intended to be, in trust for any religious or charitable use; nor is there, *dehors* that instrument, a scintilla of evidence of any such trust. The auditor says, in substance, there is no evidence that appellant was present when the codicil was executed, or had been consulted in relation thereto by testatrix or anyone in her behalf, or that he even knew he was to receive a legacy thereunder, nor was there any evidence of any communication whatever between him and testatrix, at any time prior to her decease, in relation to the bequest, or in regard to her wishes respecting the same; and in summing up on this point he finds: "There is nothing in the case to indicate or show that the legacy in question was given in trust to 'the pastor of the St. John's R. C. Church,' . . . or that such pastor should devote this particular legacy to charitable or religious uses or purposes."

It is suggested, however, that the existence of a trust for religious or charitable uses may be inferred from the official designation or description of the legatee as "the pastor of the St. John's R. C. Church," etc.—that it is a gift to the ecclesiastical officer in charge of that particular church, and not to the person who happened to be the incumbent of the office when the will took effect, and therefore it must be regarded as a gift for the benefit of the church, and in ease of the congregation worshiping therein, etc.

There would be force in this position if the legatee were an artificial being, having but one character, and that charitable, but where, as in this case, the donee is a natural person, having interests of his own, distinct from those which appertain to his ecclesiastical office as pastor of the church, it is quite different. As is said in 1 Jarman on Wills, 193, "a gift will not be deemed charitable merely from the nature of the professional character of the devisee, or on account of the testator's having accompanied the gift with an expression of his expectation that the devisee would discharge the duties incidental to such a character, however intimately those duties

may concern the welfare of others, as this merely denotes the motive of the gift, and not that the devisee is to take otherwise than beneficially."

In *Schultz's Appeal*, 80 Pa. St. 396, the testator, wishing to bequeath his estate to charitable uses, was told it would be invalid if he should die within a month, but that he might give it unconditionally to some person whom he could trust to carry out his wishes. Reuben Yeakle, bishop of the religious denomination to which the testator belonged, was selected, and an absolute bequest was made to him. Within a month thereafter the testator died and Bishop Yeakle, being informed of his death, and of his wishes respecting the property thus bequeathed, said he would carry them out. It was held by this court that, in the circumstances, the bequest was not within the act of 1855, and consequently there was nothing to fasten a trust upon the devisees. After referring to the facts and reciting the eleventh section of the act, Mr. Justice Sharswood said: "It seems very clear that the bequest to Reuben Yeakle is not within the words of the statute. There is nothing in the circumstances to fasten a trust upon him. The statute out of the way, the charities intended to be benefited would have no claim, legal or equitable, to enforce payment by him to them. He would, in the eye of the law, be guilty of no fraud, legal or equitable, either against them or the testator, if he should, even at this day, change his intentions and apply the money to some other use. Being the absolute owner, under the will, the declaration of his intention would not be binding upon him. It is not, therefore, in the words of the statute, a bequest 'to a body politic or to any person in trust for religious or charitable uses.' Had Reuben Yeakle been present when the will was executed, or the objects of the bequest been communicated to him before the testator's death, and had he held his peace, there would have been some ground for fastening a trust upon him *ex maleficio*, as in *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 52. But nothing of that kind can be pretended here." In reply to the position that the whole plan was "nothing but a contrivance to evade the statute," he further said: "No doubt such was the intention of the testator. It is said that is a fraud upon the law, and the bequest ought therefore to be declared void. But that overlooks the fact that the absolute property in the subject of this bequest was vested in the legatee, and that he is entirely innocent of any complicity in the

fraud of the testator. If the statute is practically repealed by this construction it is evident that it must be for the legislature to devise and apply a remedy, not the judiciary, whose province is not *jus daret* but *jus dicere*."

It is scarcely necessary to say that the statute cannot be evaded by any secret trust for charitable or religious uses. Anyone interested may compel the legatee or devisee to disclose any promise made by him, or facts within his knowledge, tending to prove the existence of such secret trust; and if he denies such promise, etc., proof thereof may be made *aliunde*. As is said in 1 Jarman on Wills, *233, this doctrine evidently assumes that the trust, if legal, would have been binding on the conscience of and might have been enforced against the legatee or devisee; and this ground failing the rule does not apply. "As where a testator after devising lands by a will duly attested, declares a trust in favor of charity by an unattested paper or by parol, the statute law, which affords to the donee a valid defense against any claim on the part of the charity, of course defends him against the claim of the heir, founded on the charitable trust. The case would be different, however, if the devisee had induced the testator to give him the estate absolutely under an assurance that the unattested paper was a sufficient declaration of the trust for a charity, or under a promise, either express or by silence implied, that if the estate were devised to him he would perform the trust; and, generally, it is immaterial whether the promise be made before or after the execution of the will."

Other authorities to the same effect might be cited, but those above referred to are sufficient. It follows from what has been said, that, in the absence of any evidence, facts or circumstances, tending to fasten upon appellant a trust for either religious or charitable uses, he is entitled as a legatee, in his own right, to one-half of the fund. If the testatrix had died more than one month after making the codicil, and the legacy had been paid over to him, without objection, there is nothing in the will itself nor in anything that has been shown *aliunde* that would afford the slightest ground on which the congregation, of which he is pastor, or any religious or charitable organization or association in any way connected therewith, could even hope to succeed in holding him as a trustee of the fund so received. The bequest to him was therefore not void under the provisions of the statute.

As to one-half of the net fund for distribution, the decree of the orphans' court is reversed; and it is now adjudged and decreed that the sum of five hundred and seven and fifty-three one hundredths dollars, awarded to the heirs of testatrix, be paid to N. J. O'Reilly, the appellant, and that the costs of this appeal be paid by the said heirs, the appellees.

WILLS—CREATION OF TRUST.—The intention of a testator to create a trust must be apparent from the face of the will, or none will be deemed to exist: *Boyle v. Boyle*, 152 Pa. St. 108; 34 Am. St. Rep. 629; *Heidenheimer v. Bannan*, 84 Tex. 174; 31 Am. St. Rep. 29. If property is given for the absolute benefit of the donee, who is a parent, no trust will be created by subsequent words showing that the maintenance of the children was the motive of the gift: *Seamonds v. Hodge*, 36 W. Va. 304; 32 Am. St. Rep. 854.

GILMOR'S ESTATE.

[154 PENNSYLVANIA STATE, 523.]

WILLS—REPUBLICATION—EFFECT OF.—A republished will must be construed to speak at the date of the republication.

WILLS—REPUBLICATION BY CODICIL—INTERLINEATIONS—PRESUMPTION.—A codicil operates as a republication of the original will so as to make it speak as of the date of the codicil; and if any interlineations appear therein in the handwriting of the testator, the presumption is that they were made at or before the execution of the codicil.

WILLS—EVIDENCE OF INTENT OF TESTATOR.—Extrinsic evidence cannot be adduced to qualify, explain, alter, or contradict the language of a will when the intention is clearly expressed and the objects of the bounty are definitely ascertained. To aid the context extrinsic proof of the circumstances and situation of the testator when the will was executed is admissible within the discretion of the court, and what was said at the time of its execution and attestation is admissible as part of the *res gestæ*, though not to contradict the will.

WILLS—REPUBLICATION — INTERLINEATIONS — SUBSTITUTION — EVIDENCE.—It is competent for the purpose of ascertaining the intention of the testator to show by extrinsic evidence that at the time of the republication of his will the words "or to his heirs" were added as applying to all of the legatees, and that the word "deceased" was added after the name of each legatee then dead, and the circumstances under which they were so added. Such evidence clearly shows that the testator intended the words "or to their heirs" as words of substitution, and the word "deceased" to indicate that the legatees then dead were not to receive the legacies, but that they should go to their heirs.

WILLS—CONSTRUCTION—"AND"—"OR."—Courts will transpose the clauses of a will, and construe "or" to be "and" and "and" to be "or" only when absolutely necessary to do so in order to support the evident meaning of the testator.

WILLS — CONSTRUCTION — REPUBLICATION — INTERLINEATIONS — SUBSTITUTION.—When at the time of the republication of a will the testator adds

the words "or to their heirs" after the words "as follows" in the clause in the original will reading "I give and bequeath as follows," followed by the names of the legatees, and then adds the word "deceased" after the name of each legatee then dead, it is clear that these words are intended to apply to the respective legatees if alive, and to their heirs if they be dead, and they will be construed as words of substitution, and not as words of limitation.

WILLS—BEQUEST OF PERSONALTY—CONSTRUCTION OF WORD "HEIRS."—In a bequest of personalty, the word "heirs" signifies heirs as ascertained by the statute of distributions.

O. C. Bowers, Hastings Gehr, J. M. McDowell, Bonbrake and Zacharias, and Sharpe and Sharpe, for the appellant.

W. W. Brewer, W. R. Gillan, and W. S. Hoerner, for the appellees.

THOMPSON, J. The question raised in this appeal was whether the legacies in the will of John Gilmor, deceased, lapse. John Gilmor, the testator, died November 30, 1889, unmarried, leaving surviving him an unmarried sister, who died February 21, 1891. He made his will August 18, 1883, and on September 21, 1888, adding a codicil, then republished it. By his will before this republication he gave to his sister Eliza the income of his estate during her natural life, and upon her death directed his executors to convert the estate into money, and devised it to the following-named persons, who were each to receive one share, viz: David M. Gilmor, Mary E. Ahl, Nannie Herr, Lydia B. Wilson, William Gilmor, Samuel Dorrance, James Dorrance, senior, William Dorrance, Eliza Robinson, Martha A. McClellan, Samuel P. Cummings, and William B. Cummings.

The auditor appointed to make distribution finds "that the only codicil is dated September 21, 1888, and in the latter part of the summer of 1889 Mr. Hastings Gehr and George McDowell visited testator, who produced his will, and at his request and in his presence they witnessed the same. Before this was done testator, in their presence, interlined at the bottom of the first page the words 'or to their heirs.' After making this addition, and after the witnesses had subscribed their names, the testator republished both the will and codicil." Before this republication he added after "as follows" the words "or to their heirs"; and after William Gilmor, "Decd"; Samuel Dorrance, "Desed"; James Dorrance, senior, "Deceased"; Eliza Robinson, "Deseased"; William Dorrance, "Deceased"; Martha A. McClellan, "Dsd"; Samuel P. Cummins, "Desed"; William B. Cummins, "Deod."

This will speaks from the date of its republication. In *Coale v. Smith*, 4 Pa. St. 386, it was said: "The effect of a new publication is that all which the words embrace at the time when the new publication is made shall pass thereby; or, to put it more clearly, when a man republishes his will the effect is that the terms and words of the will should be construed to speak with regard to the property the testator is seised of, and the persons named therein at the date of the republication, just the same as if he had such additional property, or such persons being *in esse* at the time of making his will, the conclusion from the fact being that the testator so intended. And this is a conclusion of law, as we have seen, not to be contradicted by any supposed absence of intention on the part of the testator, unless a contrary intent be manifested by something appearing in the codicil."

In *Linnard's Appeal*, 93 Pa. St. 316, 39 Am. Rep. 753, Mr. Justice Sterrett said: "A duly executed codicil operates as a republication of the original will, so as to make it speak as of the date of the codicil: *Coale v. Smith*, 4 Pa. St. 386; and it not only operates as an adoption of the prior will to which it refers, but also as a revocation of a intermediate will. In *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597, Chief Justice Gibson, in speaking of interlineations proved to be in the handwriting of a testatrix, says: 'The presumption is that they were made at or before the time when the will was prepared for the final act.'"

The testator's sister having died, his executors filed their account, which was referred to the auditor to make distribution. Before him the appellants as heirs at law and next of kin of legatees named in the will claimed six-twelfths of the estate, upon the ground that the testator intended by the words "or to their heirs" to substitute for the deceased legatees their next of kin.

Upon the question of compensation of executors, parol evidence was offered for the purpose of showing that the name of one of the executors was inserted in the will, and on cross-examination one of the witnesses testified: "Q. You witnessed both the will and the codicil that day? A. Yes, sir. Q. Did he submit it to you for your opinion? A. He asked about those people that were dead. I told him it might lapse, and he added 'their heirs.' Q. At that time did you read over the will? A. Yes, sir; I looked at the will."

The same witness was recalled, and testified as follows,

vis: "Q. Do you know in whose handwriting this will is? A. The whole will is in the handwriting of John Gilmor, except the word 'witness,' and 'H. Gehr,' and 'G. D. McDowell.' Q. Do you know whether this will was all written, just as it now is, at one time? A. 'Or to their heirs' was added. Q. In what connection? 'I give, devise, and bequeath, in as follows, or to their heirs,' on the last line of the first page—the last four words on the first page—you say that they were not in as originally written? A. They were not. Q. On the second page of the will, and the thirteenth line, were the words 'deceased' (looks to me like 'desd'); was it in as originally written? A. The word 'desd.' Q. Was it in originally. A. No, sir. Q. Whose handwriting are the words 'or to their heirs'? A. John Gilmor's. Q. In whose handwriting are the words 'desd'? A. John Gilmor's. Q. Are those the only alterations that you notice in the will and codicil? A. I believe so. As I said before, when I saw the will William C. McClelland's name was not in as one of the executors. Q. At the time the will and codicil were witnessed by you were the words you speak of in the will or were they made subsequently. Was it before that day or not? A. These were all in before that day. Q. The words 'or to their heirs' were put there by Mr. Gilmor? A. In our presence at the time we witnessed the codicil. Q. Were they put there before or after you signed it? A. Before. We did not witness it until about the latter part of the summer of 1889. Q. At that date of the codicil do you remember whether these other alterations in the will you have spoken of were in? A. All the alterations were put in at the same time. Q. Will you please state if you know how John Gilmor came to add these words, 'or to their heirs,' and the word 'deceased'? A. I told him that Martha McClellan's might lapse; I knew she was dead. Q. Did he know she was dead? A. Yes, sir. Q. What did he say or do in consequence of that? A. He said he would alter it the way he did."

The auditor finds "that William Gilmor, Samuel Dorrance, James Dorrance, William Dorrance, Martha A. McClellan, Samuel B. Cummins and William P. Cummins, named in the will, are dead, were all dead before the testator, and were all dead at the time of republication above mentioned, which fact was known to testator at that time."

The learned judge below sustained the auditor in not considering this testimony, because an attempt by extrinsic

testimony to prove by parol the intention of the testator. The rule is well settled that extrinsic evidence cannot be adduced to qualify, explain, alter or contradict the language of a will, but it must stand as written, where the intention is clearly expressed and the objects of the bounty are definitely ascertained. This rule has been rigidly maintained, and doubtless for the protection of estates will continue to be so by judicial decisions. While this is true for some purposes proofs *dehors* the will may be admitted. It is said in Schouler on Wills, section 579: "But to aid the context by extrinsic proof of the circumstances and situation of the testator when it was executed is constantly permitted at the court's discretion, and this constitutes a proper, indeed often an indispensable, matter of inquiry when constructing a will. For whatever a will may set forth on its face, its application is to persons and things external, and hence is admitted evidence, outside the instrument, of facts and circumstances, which have any tendency to give effect and operation to the terms of the will, such as the names, descriptions, and designations of beneficiaries named in the will, the relation they occupy to the testator, whether testator was married or single, and who were his family, what was the state of his property when he made his will, and when he died, and other like collateral circumstances. Such evidence being explanatory and incidental is admitted not for the purpose of introducing new words or a new intention into the will but so as to give an intelligent construction to the words actually used, consistent with the real state of the testator's family and property; in short, so as to enable the court to stand in the testator's place and read it in the light of those surroundings under which it was written and executed."

In Jarman on Wills, volume 1, section 394, it was said: "Though it is (as we have seen) the will itself (and not the intention as elsewhere collected) which constitutes the real and only subject to be expounded yet in performing this office a court of construction is not bound to shut its eyes to the state of facts upon which the will was made; on the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator. To this end it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret, and guided by the light thus thrown on the

testamentary scheme he may find himself justified in departing from a strict construction of the testator's language, without allowing conjectural interpretation to usurp the place of judicial interpretation."

It is said in Wharton on Evidence, section 992, in speaking of the exception when extrinsic evidence may be resorted to: "What is said at the time of the execution and attestation is admissible as part of the *res gestæ*, though not to contradict the will." Again in section 999: "In construing a will so is this position accurately expressed by Blackburn, J., the court is entitled to put itself in the position of the testator and to consider all the material facts and circumstances known to the testator with reference to which he is taken to have used the words in the will and then declare what the intention evidenced by the words used with reference to these facts and circumstances, which were (or ought to have been) in the mind of the testator when he used those words."

It was therefore competent for the purpose of ascertaining the intention of the testator to show that at the time of the republication of his will the words "or to their heirs" were added; that the word "deceased" was added after the name of each of the legatees who were dead, and the circumstances under which it was so added. While this evidence cannot be resorted to either to control or modify the intention of the testator, it may serve to aid in ascertaining what the testator did intend. It is clear that from the fact that he republished his will so modified, and inserted at the time these words, indicating that the legatees in question were dead, that he intended "or to their heirs" as words of substitution. When the original will was executed the legatees in question were alive and when the republication took place they were dead. He therefore added after their names "deceased" and thus clearly indicated that as they were dead they were not to receive the legacies. Such the case, in order to indicate who were to receive them, he wrote before the list of their names "or to their heirs." It seems manifest that in making this republication and in writing "deceased" after the names of these legatees he intended to designate the persons who are to take the legacies in lieu of them.

It is contended however that the word "or" is to be read as "and" reading thus "and to their heirs," and so reading them they became words of limitation and not of purchase. Words have been transposed to carry out the evident intention of the

testator. "Or" has been read as "and" and "and" has been read as "or." This has been done when it has been necessary to reach the true meaning of a will. No word will be rejected if an intelligent meaning can be given to it. In *Gittings v. McDermott*, 2 Mylne and K. 75, it is said: "The force of the disjunctive word 'or' is not easily to be got over. Had it been 'and' the words of limitation would of course, as applied to a chattel interest, have been surplusage, but the disjunctive marks, as plainly as possible, that the testator by using it intended to provide for an alternative bequest; namely, to the legatees if they should survive, and if they should not, to their heirs." In Jarman on Wills, volume 1, *486, it is said: "But since *Grey v. Pearson*, 6 H. L. Cas. 61, the cases last noticed have lost much of their weight as authorities for applying to any given case the rule which would change 'and' into 'or' in order to prevent one member of a compound sentence being rendered inoperative. Though it be a canon of construction, that effect is if possible to be given to every word used, it is one which must bend to circumstances, and where the result of changing 'and' into 'or' would be only to render one member of the sentence inoperative instead of the other the change certainly ought not to be made. It does not appear to have been made in any case since *Grey v. Pearson*, 6 H. L. Cas. 61, which indeed was treated by Sir J. Romilly as having overruled *Bell v. Phyn*, 7 Ves. 459, and *Maberly v. Strobe*, 8 Ves. 450, as well as *Brownsword v. Edwards*, 2 Ves. Sen. 243." In *Appleton v. Rowley*, 8 L. R. Eq. Cas. 145, it was said: "Where the word 'or' is used it is intended to prevent a lapse. If in this case the gift after the life estate had been to Sarah Gaywood and Alice Key 'or' their heirs and representatives I should follow the decision in *In re Porter's Trust*, 4 Kay and J. 188; *In re Newton's Trust*, L. R. 4 Eq. Cas. 171, and *Salisbury v. Petty*, 3 Hare, 86, and should have held that the children or representatives took by way of substitution, but here unfortunately it is 'and' their heirs and representatives." In *Morgan v. Thomas*, 9 L. R., Q. B. Div. 645, Sir George Jessel illustrated in a somewhat ludicrous way the fallacy of changing the natural meaning of words. He says: "You will find it said in some cases that 'or' means 'and' but 'or' never does mean 'and' unless there is a contest which shows it is for 'and' by mistake. Suppose a testator said I give the black cow on which I usually ride to A B, and he usually rode on a black horse, of

course, the horse would pass, but I do not think any annotator of cases would put in the marginal notes that 'cow' means 'horse.'" In *Griffith v. Woodward*, 1 Yeates, 818, it was said: "Courts of justice will transpose the clauses of a will and construe 'or' to be 'and' and 'and' to be 'or' only in such cases when it is absolutely necessary so to do, to support the evident meaning of the testator. But they cannot arbitrarily expunge or alter words without such apparent necessity." No reason can be adduced in this case to show a necessity for the change of the word "or" to "and." The republication of the will, the knowledge of the death of the legatees at that time, the writing of the word "deceased" after these names, and before the list of legatees "or to their heirs" indicate words of substitution and that "or" was clearly intended to be used for that purpose.

It is contended the position of the words "or to their heirs" is such they cannot have any effect. The will originally read: "I give and bequeath in as follows," and then follow the names of the legatees. At the republication the words "or to their heirs" were added after "as follows." It is clear that the intention was that these words were intended to apply to the respective legatees.

The appellees substantially rest their contention upon *Sloan v. Hanse*, 2 Rawle, 28, and *Barnett's Appeal*, 104 Pa. St. 842. In the first case, decided before the act of 1833 in regard to passing estates without words of inheritance, the legatee was dead; and, the fact being unknown to the testator, that event was not in any degree contemplated by him, it is said: "Had the testator meant to provide against accident from the death of either of the principal objects of his bounty it is reasonable to suppose he would, instead of leaving his meaning to conjecture, have said so in terms. He has not done so, and the inference to be drawn from the use of a copulative instead of a disjunctive is too feeble to disinherit the heir." But in the present case the death of the legatees having taken place before republication he added after each of them the word "deceased" to indicate their death, and then "or to their heirs." He thus intended to use words of substitution. In other words he intended to exclude a lapse and to indicate those who should take. In the second case, *Barnett's Appeal*, the will devised to the four sisters of the testator to each one-fourth "to them and to their heirs." Two of the sisters at the time of the execution of the will were dead. The decision

there was that the words "and to their heirs" were words of limitation, and that the testator did not intend them as words of purchase. It was said in that case: "There are several cases where the word 'heirs' has been held to mean children, but they were all instances where such was the intention of the testator as gathered from the will itself. This will contains nothing from which such an intent can be inferred." The difference between that case and the present one is marked. The words there used are "to them and to their heirs," while here the word "deceased" is written after the legatees, and the words used are "or to their heirs." From the will itself the intent is clear that when the testator republished it and altered its language, inserting the word "deceased" and adding "or to their heirs," he intended words of substitution and not of limitation. These words being those of substitution, the persons who thus are intended to take can be clearly ascertained. In *McKee's Appeal*, 104 Pa. St. 573, it is said: "In a bequest of personalty, unless a contrary intent is indicated by the will, the word heirs signifies heirs as ascertained by the statute of distribution: *Baskin's App.*, 3 Pa. St. 304; 45 Am. Dec. 641; *Eby's App.*, 84 Pa. St. 241; *Bender's App.*, 3 Grant, 210." In *Ashton's Appeal*, 134 Pa. St. 395, Mr. Justice Sterrett says: "When used in a gift of personalty it is very frequently employed to denote those who are entitled to take under the statute of distribution unless there is something to indicate a contrary intention." We have then in this case words substituting persons to receive as such and such persons clearly ascertainable, and therefore the decree of the orphans' court is reversed, and the record remitted for further proceedings, the appellees to pay the costs of this appeal.

WILLS—REPUBLICATION.—The republication of a will by codicil draws the will down to the date of the codicil in the very terms of the will, and makes it operate as if it had been executed in those terms; *Harvey v. Chouteau*, 14 Mo. 587; 55 Am. Dec. 120. When a codicil is so executed as to operate a republication of the will, both will be read and construed as one instrument and the will will be considered as of the date of the codicil: *Hawks v. Eugart*, 30 Neb. 149; 27 Am. St. Rep. 391. See also the extended note to *Graham v. Burch*, 28 Am. St. Rep. 353.

WILLS—REPUBLICATION BY CODICIL.—The republication of a will by a codicil is good: *Wikoff's Appeal*, 15 Pa. St. 281; 53 Am. Dec. 597. An olographic or unattested will may be republished by a properly attached codicil: *Harvey v. Chouteau*, 14 Mo. 587; 55 Am. Dec. 120, and note. A codicil republishes a will so as to pass to the residuary devisee lands purchased by the testator between the times of making the will and the codi-

oil: *Drayton v. Rose*, 7 Rich. Eq. 328; 64 Am. Dec. 731. A codicil duly attached to a paper which was never signed, attested and published as a will, has the effect of giving force and operation to the whole as one will: *Beall v. Cunningham*, 3 B. Mon. 390; 39 Am. Dec. 469, and note.

WILLS—PAROL EVIDENCE TO VARY OR CONTRADICT.—Parol evidence is not admissible either to contradict, add to, or explain the contents of a will, even when the consequence is a partial or total failure of the testator's intended disposition: *Bingel v. Volz*, 142 Ill. 214; 34 Am. St. Rep. 64, and note. For a full discussion of this subject see the extended notes to the following cases: *Heidenheimer v. Bauman*, 31 Am. St. Rep. 38; *Chambers v. Watson*, 46 Am. Rep. 72, and *Kertz v. Hibner*, 8 Am. Rep. 689.

WILLS—CONSTRUCTION—"AND"—"OR."—For a discussion of this subject see *Janney v. Sprigg*, 7 Gill, 197; 48 Am. Dec. 557, and extended note.

WILLS—HEIRS—DEFINITION.—Heirs are the persons in whom real estate vests by operation of law, on the death of the one who was last seized: *Dukes v. Faulk*, 37 S. C. 255; 34 Am. St. Rep. 745. See also the extended note to *In re Ingram*, 12 Am. St. Rep. 82.

SIMRELL'S ESTATE.

[154 PENNSYLVANIA STATE, 604.]

WILLS.—PROOF OF EXECUTION of a will must be made by two witnesses, each of whom must separately depose as to all facts necessary to complete the chain of evidence, so that no link of it may depend on the credibility of but one witness.

WILLS—ERASURES—PROOF OF EXECUTION.—When a will duly executed is not regularly republished or re-executed after erasures therein have been made, and there is but one witness to the fact of the erasures being made by authority of the testator, the will with the erasures in it cannot stand as his will for lack of statutory proof of two attesting witnesses to its execution in that form, and when such will in its original state without the erasures is duly proved by two subscribing witnesses, it is in that form the last will of the testator, and as such must be admitted to probate.

APPEAL from the probate of a will. Such will as admitted to probate was in the following words:

"THE LAST WILL AND TESTAMENT OF PHEBE ANN SIMRELL.

"WHEREAS, I, being in good health and of sound mind, do declare this to be my last will and testament.

"If my husband, Walter Simrell, should survive me, I will wish him to have his living and to be well taken care of by my son, Charles W. Simrell, whom I desire to have take charge of my property and to live on it until my husband's death. Six months after his death I desire my property to be sold and to be equally divided between my children and my grandson, Frank D. Thomas, whom I desire to share equally with

the rest. *But if my son Charles should not be living at that time*, I then desire that my husband should chose between any of my children *except my son Byron Simrell*, and the one that he desires to live with shall take charge of my property and live on it until my husband's death.

"But if I should survive my husband, Walter Simrell, at my death I desire the one that is living on my property to dwell thereon for six months after my death, at the expiration of which time I desire my property to be equally divided between each of my children that are living, and my grandson, Frank D. Thomas, whom I desire to share equally with the rest, and I appoint Deodat Smith and Francis Miller to kindly act as my administrators and to this I add my signature.

PHOEBE ANN SIMRELL.

"Witness:

Ruth Arnold Barney,

Frank D. Thomas.

"June 11th, 1880."

The parts of the will appearing in italics had been erased. The remaining facts appear in the opinion.

W. S. Hulstander and A. A. Vosberg, for the appellant.

R. A. Zimmerman and C. B. Gardner, for the appellees.

GREEN, J. We are of opinion that our decisions in the two cases of *Derr v. Greenawalt*, 76 Pa. St. 239, and *Charles v. Huber*, 78 Pa. St. 448, control the determination of the present contention. In *Derr v. Greenawalt* the will was executed by the testator in the presence of the two attesting witnesses, with an unfilled blank left in it for the name of the residuary legatee. One witness testified that the name was afterwards inserted in the presence of the testator and by his direction. The person who inserted the name testified that he wrote it, but could not recollect whether he did so at the direction of the testator or in his presence. The will continued in the possession of the testator a long time after, and it was proved that subsequent declarations were made by the testator that the person named was his legatee. We held that these facts were insufficient to establish the residuary bequest. Mr. Justice Sharswood, stating that there was no difficulty in regard to the rule applicable to the subject, quoted with approbation the language of Chief Justice Gibson, in *Hock v. Hock*, 6 Serg. & R. 47, as follows: "Proof of execution must be made by two witnesses, each of whom must separately

depose as to all facts necessary to complete the chain of evidence, so that no link of it may depend on the credibility of but one. When the evidence is positive there can be no difficulty, for the witnesses then attest the simple fact of execution itself, but where the evidence of one or both is circumstantial, each must make proof complete in itself, so that if the act of assembly were out of the question, the case would be well made out by the evidence of either. Circumstantial proof cannot therefore be made by two or more witnesses alternating with each other as to the different parts of the aggregate of circumstances which are to make up the necessary sum of proof, the evidence of each not going to the whole."

The facts in *Derr v. Greenawalt*, 76 Pa. St. 239, were that Mrs. Huber testified that her son George Rise wrote the name in the blank in the presence of the testator and by his express direction, but George Rise was unable to testify that he wrote the name in the blank in the presence of the testator or by his direction, though he said that he did write the name. There was therefore but the testimony of one witness as to the essential fact that the name was inserted in testator's presence and by his authority.

In the present case there was the positive testimony of Mrs. McDonald that she herself made the erasures after the will was executed and attested, and that she and the testatrix were alone when it was done. She said she herself proposed the erasures, but that her mother, the testatrix, wished it done. The subscribing witnesses testified that the will did not have the erasures in it when they attested it. There was no republication or re-execution of the will after the erasures were made, and there is but one witness who testifies to the fact of the erasures being made by authority of the testatrix. It is impossible to presume either that the erasures were made before execution, or that they were made by the executrix, because the positive and uncontradicted testimony is that they were made after execution and not by the testatrix herself. The statutory proof is therefore lacking, and the will with the erasures in it cannot stand as the will of the testatrix.

In the case of *Charles v. Huber*, 78 Pa. St. 448, the testator made a will devising land to his two sons at a valuation. It was attested by two witnesses. When presented for probate the will showed an erasure of the valuations and other valua-

tions interlined. One of the witnesses having died, his writing was proved and the will admitted to probate. In an issue on appeal the surviving witness testified that the alteration was made after the execution, by direction of the testator, afterwards reacknowledged before the same two witnesses; the handwriting of the deceased witness was proved on the trial of the issue. It was held that the paper as altered was not proved as a will. In the opinion this court said: "The will as it stood before alteration was not proved, for the deceased subscribing witness had not proved the will as it had originally stood, but proved it only in its altered state, which left the original text proved by a single witness only. Then the alteration being proved by a single witness only, the paper in neither form was legally proved. The consequence is that the paper fell as a will."

Both of the cases cited go much further in the direction of the invalidity of the wills in question than it is necessary to go in the present case. At the utmost, under the testimony, the alteration was made by one who was not a subscribing witness, by authority of the testatrix. Both of the subscribing witnesses were examined, and one of them said the erasures were not in when he signed as a witness, and the other did not know. But Mrs. McDonald testified that she was present when the will was executed, and saw the testatrix and the attesting witnesses sign, and that the erasures were made by her after that time and within a few days before the death of the testatrix. There was no pretense of republication or acknowledgment, and the proof of the will in its altered state depends only upon the testimony of one witness. Under all the authorities such a will cannot stand.

As the will in its original state, without the erasures, was fully proved by the oaths of the two subscribing witnesses, it follows that it was the last will and testament of the testatrix, and in that condition and as such it must be admitted to probate.

The order of the court below is reversed, and it is ordered and decreed that the paper writing purporting to be the last will and testament of Phoebe Ann Simrell, as it was in its original state before any of the erasures therein were made, is her last will and testament, and should be admitted to probate as such, all the costs to be paid out of the estate of the testatrix. The record is remitted for further proceedings.

WILLS.—PROOF OF EXECUTION by one subscribing witness is sufficient if he can testify to every fact necessary to its legal execution, although the statute may require two witnesses to attest it: *Lindsay v. McCormack*, 2 A. K. Marsh. 229; 12 Am. Dec. 387, and note; *Jackson v. Vickery*, 1 Wend. 406; 19 Am. Dec. 522, and note; *Dan v. Brown*, 4 Cow. 483; 15 Am. Dec. 385, and note; note to *Dickey v. Malecki*, 34 Am. Dec. 139. A will with two subscribing witnesses, admitted to probate in common form prior to 1856, upon proof by one of the witnesses, is properly proven: *Cowles v. Reavis*, 109 N. C. 417.

WILLS—EFFECT OF ERASURES, INTERLINEATION OR MUTILATION.—This question is discussed at length in the monographic note to *Graham v. Birch*, 28 Am. St. Rep. 350.

WALLACE v. SMITH.

[155 PENNSYLVANIA STATE, 73.]

MORTGAGE.—A CONVEYANCE INTENDED MERELY AS A SECURITY for a debt is in effect a mortgage between the parties and all persons having notice of the real nature of the transaction.

EVIDENCE TO PROVE THAT A DEED WAS INTENDED AS A MORTGAGE.—THE BURDEN OF PROOF is on him who claims that an apparent conveyance of real property is in effect a mortgage. He can prevail only upon clear, precise, and indubitable evidence that the deed was intended by both parties thereto to operate only as a mortgage. But if the evidence is of this character on his side, he is entitled to succeed, though there may be rebutting evidence to the contrary if the court, notwithstanding such evidence, is still convinced of the truth of his claim.

EVIDENCE TENDING TO PROVE THAT AN APPARENT DEED WAS A MORTGAGE.—The *indicia* of intention which may be looked to when a deed absolute on its face is claimed to be a mortgage are the sufficiency of the price paid, the surrender or retention of pre-existing securities or evidences of indebtedness, the obligation to repay the purchase money, and the entry of the grantee in possession.

MORTGAGE.—IF A DEED IS TAKEN FROM A DEBTOR WHOSE DEBT IS NOT SURRENDERED, canceled, nor otherwise discharged, it must be regarded as a mortgage.

MORTGAGE.—TAKING A DEED IN PAYMENT OF PRE-EXISTING INDEBTEDNESS AND EXECUTING ARTICLES giving the grantor the right to repurchase the property within a specified time do not make the obligation a mortgage.

SUFF to declare a deed absolute on its face to have been delivered and received as a mortgage. In April, 1880, the complainant was indebted to John Rynd in the sum of four thousand dollars, and conveyed to him real property worth seven thousand dollars, but ever afterwards remained in possession of the property so conveyed. In May, 1885, Rynd conveyed the property in trust to the defendant Smith, but Rynd was the sole beneficiary under the trust. Five years

later the complainant tendered seven thousand dollars and requested a conveyance, and he also professed his willingness to pay all interest which had accrued on his indebtedness. The parties and their witnesses disagreed as to whether the conveyance made by complainant was in payment of his pre-existing indebtedness, or received merely as security therefor. The master to whom the cause was referred found in favor of the complainant, but the trial court set aside his findings and entered judgment dismissing his bill.

M. A. Woodward, for the appellee.

James Fitzsimmons and John S. Robb, for the appellants.

STERRETT, J. This case originated in transactions between the plaintiff and John Rynd, one of the defendants, prior to June 3, 1881, and hence it is not affected by provisions of the act approved on that day. Nothing was then better settled by a long line of decisions than that a conveyance of land, intended to operate merely as a security for money, was, in effect, a mortgage, not only as between the parties themselves, but also as to those who had notice of the transaction: *Guthrie v. Kahle*, 46 Pa. St. 331; *McClurkan v. Thompson*, 69 Pa. St. 305. The reason why such a deed, absolute on its face, might be treated in equity as a mortgage, was because it would be a fraud on the part of the grantee, for example, to hold and use, as indefeasible, an instrument which was delivered to and accepted by him as a defeasible instrument or mortgage. The plaintiff in such cases, seeking to reform the instrument, must invoke the equity power of the court, and upon that he must stand or fall. The burden of proof is upon him, and it is only upon clear, precise, and indubitable evidence of the fact that the deed was intended by both parties thereto to operate only as a mortgage that he can succeed in having it so declared by a chancellor: *Rowand v. Finney*, 96 Pa. St. 192; *Hartley's Appeal*, 103 Pa. St. 23. If the party setting up the defeasance is able to prove the fact by evidence that is not only clear and precise, but at the same time carries with it a conviction of its truth, he is entitled to succeed, notwithstanding there may be rebutting testimony tending to prove the contrary. Full credence may be given to the testimony on one side, while that on the other may be rejected as unworthy of belief, or, at best, insufficient to create even a serious doubt: *Hartley's Appeal*, 103 Pa. St. 23. As was said by our late brother Clerk: "Each case must, of course, to a great extent

depend upon the circumstances peculiar to itself; but there are certain *indicia* of intention which frequently occur, and, when they do exist, are always looked to. Among these are the sufficiency of the price paid; whether or not existing securities or evidences of indebtedness were given up or canceled; whether there was any obligation to repay the purchase money, and whether the grantee entered into immediate possession," etc.: *Huoncker v. Merkey*, 102 Pa. St. 462, and authorities there cited.

One of the tests by which to determine whether the conveyance of land in consideration of grantor's indebtedness to grantee is to be deemed an absolute sale or a mortgage is the effect which the parties intend the conveyance shall have on the indebtedness itself. In 1 Jones on Mortgages, section 267, the subject is discussed thus: "If the indebtedness be not canceled equity will regard the conveyance as a mortgage, whether the grantee has so regarded it or not. He cannot at the same time hold the land absolutely and retain the right to enforce payment of the debt on account of which the conveyance was made. The test, therefore, in cases of this sort, . . . is to be found in the question whether the debt was discharged or not by the conveyance." To the same effect is *Null v. Fries*, 110 Pa. St. 521, in which it was held that an absolute conveyance, in consideration of grantor's indebtedness, etc., may be shown to have been a mortgage if the debt survived. If, however (as in that case), the judgments and securities which constituted the consideration for the conveyance are satisfied and canceled, the mere fact that the grantee executed articles of agreement giving the grantor an option to repurchase the property within a certain time will not make the transaction a mortgage.

The substance of the bill and answer and the principal facts of the case sufficiently appear in the report and supplemental report of the learned master. It is therefore unnecessary to restate them here. His inferences of fact and conclusions of law being in favor of plaintiff, he accordingly recommended a decree substantially as prayed for. Sixteen exceptions to the report were filed by defendants. These were fully heard by the learned court, who, upon consideration thereof, sustained five of them, and dismissed the bill, with costs to be paid by plaintiff. The exceptions thus sustained are fully recited in the second to sixth specifications, inclusive. In substance, they are to the effect that the case,

upon the pleadings and the proofs, was insufficient to warrant the master in finding that the deed in question was intended by the parties thereto to operate as a mortgage, and in so treating it in the decree he recommended. After an examination of the record, including the pleadings and the testimony, and due consideration of the same in the light of the principles applicable to such cases, especially the character and degree of the proof required, we are constrained to the same conclusion that was reached by the learned court below. While there are some *indicia* of an intention to consider the deed in question as merely security for the money advanced by Rynd, one of the defendants, to pay plaintiff's mortgage debt to the Dollar Savings Bank, the proof is not of that clear, precise, and convincing character that is required to move the conscience of a chancellor to reform a deed, absolute on its face, and declare by his decree that the parties thereto intended that it should operate merely as a mortgage. Referring to Rynd's assumption and payment of said mortgage debt, amounting, with interest, to nearly four thousand four hundred dollars, plaintiff was asked whether he then or thereafter gave Rynd any obligation or written evidence of indebtedness for the amount thus advanced, or for other money, and his reply was, "No, not that I remember."

The substance of plaintiff's testimony as to his understanding at the time the land was conveyed to Rynd is, that the latter would reconvey the same "at any time I could see my way clear to give back his money"; "that was the only promise that was made." In slightly varied forms of expression he repeated this several times. His wife's testimony was to the same effect. In his affidavit of defense, filed, in No. 141, October term, 1891, he stated the arrangement thus: "If said affiant should elect to redeem said realty at any time, that affiant would have the privilege or right so to do, by repaying the amount he, affiant, would owe the said John Rynd. That on the — day of May, 1890, affiant elected to redeem said realty, and tendered a certain sum of money for that purpose to both Rynd and Smith."

It is even more than doubtful whether ever such election would have been attempted or tender made if it had not been for the advance in prices of land in the neighborhood, stimulated by developments for oil purposes. It does not appear that, during the more than nine years preceding, plaintiff had ever seen his "way clear" to give back to Rynd the money

he paid or advanced in consideration of the conveyance in April, 1880. Nor does it appear that he was ever under any obligation to repay the same, however clearly he might have seen his way to do so. On the theory of indebtedness, the amount which Rynd would have been entitled to receive when suit was brought, including money advanced to pay the mortgage, the judgment, etc., with interest, would be nearly ten thousand dollars.

When Mr. Smith accepted the trust under Mr. Rynd's deed of May 18, 1885, and assumed charge of the farm, plaintiff never suggested that he had any interest therein, or any right to redeem the same; nor did he ever intimate anything of the kind for nearly five years thereafter. On the contrary, after the death of his mother, in 1888, for whom the provision was made in the trust deed, plaintiff leased the farm from the trustee, and at one time spoke of buying it. It was not until shortly before this suit was brought, in 1890, that the trustee received any intimation of plaintiff's claim, either from him or from any other source. Plaintiff's equity, if he ever had any, is very stale.

There are other facts and circumstances tending to cast doubt on plaintiff's claim, but it is unnecessary to specify them. It is sufficient to say that his contention is not sustained by that clear, precise, and indubitable proof which alone should move a chancellor to declare by his decree that the deed in question was intended by the parties thereto to operate merely as security for the money advanced. We therefore think there was no error in sustaining the five exceptions referred to, and in dismissing the bill at plaintiff's costs.

Decree affirmed, and appeal dismissed, with costs, including costs in the court below, to be paid by appellant.

MORTGAGE—CONVEYANCE ABSOLUTE IN FORM WHEN TREATED AS.—A conveyance absolute in form will be treated as a mortgage when it is shown by evidence, clear, certain, and trustworthy, that the instrument was executed, delivered, accepted, and intended by the parties to secure the payment of a debt: *Perot v. Cooper*, 17 Col. 80; 31 Am. St. Rep. 253, and note with the cases collected. See also the extended note to *Hutslar v. Phillips*, 4 Am. St. Rep. 697, and the note to *Mannix v. Purcell*, 15 Am. St. Rep. 584.

EVIDENCE TO CONVERT ABSOLUTE DEED INTO MORTGAGE must be plain and convincing: *Mahoney v. Bostwick*, 96 Cal. 53; 31 Am. St. Rep. 175, and note with the cases collected.

MILLER PIANO COMPANY v. PARKER.

[155 PENNSYLVANIA STATE, 208.]

THE SALE OF PROPERTY BY A BAILEE FOR HIRE in possession thereof, though to an innocent purchaser, does not divest the title of the bailor. The rule that where one of two innocent persons must suffer the loss should fall on him whose act or omission made the loss possible is inapplicable.

TRESPASS for converting a piano which had been leased by plaintiff to Mrs. Davis, and while in her possession under such lease had been sold by her to the defendant. The trial court was asked to instruct the jury that the possession of the piano was *prima facie* evidence of ownership; that the plaintiff, by failing to enforce the terms of lease, had been guilty of laches, preventing his recovery, and that by not stamping the piano "leased," or "rented," or otherwise indicating that he had not parted with its ownership, he had forfeited his right to recover; and that where one of two innocent persons is to suffer for the act of a third, he who gave the means of doing the wrong must alone bear the consequences. All these instructions were refused, and the jury directed to return a verdict for the plaintiff.

W. A. Manderson, for the appellant.

Ormond Rambo, for the appellee.

PER CURIAM. Mere possession is at best but evidence, *prima facie*, of ownership of a personal chattel. It is never conclusive of the title. The reason is that it may result from a purchase, a bailment, or a trespass. The general rule is that one cannot make to his vendee a good title to articles that he does not own. If the possession of the seller is that of a bailee or a trespasser, the rule that declares that where one of two innocent persons must suffer loss, the loss should fall on him whose act or omission made the loss possible, does not apply. A bailment for hire makes it possible for a dishonest bailee to sell the goods to an innocent purchaser, but such a sale will not pass the title of the bailor, for he has done or omitted nothing that should estop him from asserting his ownership of the goods. The contract of bailment made it necessary to give possession of the thing bailed to the bailee for the special and temporary purposes of the bailment, but the title remained in the owner. The fault in such a case is that of the dishonest bailee. The court below committed no error in so holding, and the judgment is affirmed.

BAILMENT—SALE OF PROPERTY BY BAILER.—A *bona fide* purchaser of goods from a bailee, not at market overt, cannot hold them against the owner: *Kitchell v. Vanadar*, 1 Blackf. 356; 12 Am. Dec. 249. Bailees for a special purpose have no right to sell the property bailed, and upon such sale the bailment is determined, and the real owner may replevy it from the vendee: *Emerson v. Fisk*, 6 Greenl. 200; 19 Am. Dec. 206; *Bailey v. Colby*, 34 N. H. 29; 66 Am. Dec. 752, and extended note; *Dunlap v. Gleason*, 16 Mich. 158; 93 Am. Dec. 231, and note; and see *Agnew v. Johnson*, 22 Pa. St. 471; 62 Am. Dec. 303. A bailee for hire has no right to sell or exchange the article bailed, even to a *bona fide* purchaser: *Singer Mfg. Co. v. Belgart*, 34 Ala. 519; *Orocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 118, and note. See further the extended note to *Bolling v. Kirby*, 24 Am. St. Rep. 814.

GARDEN CITY NATIONAL BANK v. FITLER.

[155 PENNSYLVANIA STATE, 210.]

NEGOTIABLE INSTRUMENTS.—If a bill is indorsed to a bank for collection, it may, without any indorsement on its part, return such bill to its indorser, who is thereupon entitled to maintain an action thereon as if he had not so indorsed it.

NEGOTIABLE INSTRUMENTS.—NOTICE OF PROTEST AND OF NONPAYMENT of a bill of exchange is not necessary to charge one who is both the drawer and acceptor thereof.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION BILL.—The averment that certain bills were accepted for the accommodation of the drawers on their representation that the proceeds would be applied to specific purposes, and that the drawers failed to apply such proceeds to such purposes, does not allege any defense as against the *bona fide* holder of such bills.

ACTION on a bill of exchange which, and the indorsement thereon, are as follows:

“\$1,250.

PHILADELPHIA, March 6, 1890.

“Four months after date pay to the order of Daniel H. Bacon twelve hundred and fifty dollars, value received, and charge the same to the account of C. H. Fitler.

“To C. H. Fitler, 909 Walnut St., Phila.

“Accepted C. H. Fitler.

“Indorsed:

“Pay to the order of Thos. F. Morrison, Cashier.

“DANIEL H. BACON.

“Pay Keystone National Bank or order for collection account of the Garden City Bank, San Jose, Cal.

“THOS. F. MORRISON. Cashier.”

The defendant objected to the pleading of the plaintiff, because it did not contain any averment of the indorsement by the Keystone Bank, nor of a demand for payment, or of the

protest of the bill. The defendant, in his affidavit of defense alleged as follows: "Further: On the merits he says there was no consideration given for the draft, nor is he indebted to anyone therefor, either plaintiff, drawer, or indorsers. Originally deponent gave his draft as accommodation without consideration received, in favor of one Nathan L. Leahan, and George Leahan, who were indebted to plaintiffs, upon their representation that the plaintiff would advance them moneys for the express purpose of taking up certain notes of several thousand dollars, owing by them to one Baumgarten in a transaction of purchase of one-half interest of land in San Miguel, Lower California, on their joint account, which when done was to be transferred to deponent in consideration of other moneys which deponent had advanced to them as well. Deponent paid on account thereof in 1889 and 1890 to the plaintiffs two thousand dollars, and gave the draft in suit. Deponent did not know, but only afterwards discovered, the falsity of the statements and representations made to him, and found out that the whole scheme was a fraud on him. The plaintiffs knew of the said arrangement and transaction when they received the draft. The money was not used for the purposes aforesaid, but was deceitfully appropriated otherwise, and deponent discovered that their alleged title and claim to the said land was fraudulent, and that the draft was used in bad faith towards the deponent. He would not have given the same had he known at the time the wrongful use that was made of it, or so intended. Neither were the notes of the said parties taken up as agreed upon. The name of Daniel H. Bacon was only used by the parties formally and for their convenience, as deponent was not indebted to him. He claims that the two thousand dollars should be returned to him by the said plaintiff, as no consideration was received therefor.

Judgment for plaintiff for want of sufficient affidavit of defense.

Aaron Thompson, for the appellant.

Charles E. Pancoast and Frederick J. Shoyer, for the appellee.

Per CURIAM. In its amended statement, the plaintiff bank claims to recover from defendant twelve hundred and fifty dollars, with interest, etc., due on defendant's draft, a copy of which, with indorsements thereon, is fully set forth therein.

It is averred that said draft was drawn by defendant upon himself to the order of Daniel H. Bacon, accepted by the drawee and indorsed by the payee to the order of Thomas F. Morrison, cashier, who, being cashier of plaintiff bank, indorsed the same to the Keystone National Bank or order, for collection for account of said plaintiff bank; that said plaintiff bank, "being the holder of said draft so indorsed before maturity for value given, delivered the same so indorsed to said Keystone National Bank for collection for plaintiff's account;" that "said draft was duly protested at maturity thereof for nonpayment, and returned by said Keystone Bank to plaintiff, who is the holder and owner thereof;" that "the said sum of twelve hundred and fifty dollars with interest, and two dollars and five cents paid for protest, are wholly due and unpaid and are justly payable from defendant to plaintiff." To this is appended the jurat of Thomas F. Morrison, who swears he is the "cashier of the Garden City National Bank, plaintiff above named, and that the facts set forth in the above statement are true."

The statement, substantially complying with the procedure act and rule of court, sets forth a good cause of action.

There is no merit in either of the four specific objections stated in the affidavit of defense. The third objection that "there is no indorsement of the Keystone National Bank . . . one of the indorseees," is fully answered by the averment in plaintiff's statement, to the effect that the draft was indorsed by plaintiff bank to said Keystone National Bank merely for the purpose of collection for account of plaintiff, and, when it was protested for nonpayment, said indorsee returned it to plaintiff bank. The fourth objection, that demand of payment, protest, and notice to defendant, etc., are not shown or averred, is equally destitute of merit. There is a distinct averment of protest in plaintiff's statement, but whether defendant was duly notified thereof or not is immaterial, in view of the fact, which is not denied, that as drawee of the bill he accepted the same.

That portion of the affidavit which claims to set forth a defense "on the merits," etc., is quite too vague and indefinite; and, moreover, it fails to connect the fraud suggested with the purpose for which the draft was given. The alleged misrepresentations of the Leahans does not impart a taint to the draft in suit. In *Gray v. Bank of Kentucky*, 29 Pa. St. 365, the affidavit of defense alleged that the bills were accepted

for accommodation of the drawers, that the proceeds were to be applied to taking up prior acceptances, and that the drawer failed to so apply the proceeds, etc., and it was held that such misapplication, though a fraud, was not such an one as imparted a taint to the paper, and was insufficient to prevent judgment.

Defendant avers that originally he gave his accommodation draft in favor of the Leahans upon their representation that plaintiff bank would advance them money for the express purpose of taking up certain notes, etc.; that, in 1889 and 1890, he paid plaintiff two thousand dollars on account, and gave the draft in suit in payment of the residue. He does not state that he and the Leahans were the only parties to the original draft which he thus took up, by paying part cash and giving the draft in suit for the residue; nor does he aver that plaintiff bank was not the *bona fide* holder, for value before maturity, of said original draft, nor does he distinctly state any fact or facts that warrant any such inference; nor does he deny, expressly or by necessary implication, the averment in plaintiff's statement to the effect that it became the holder of the draft in suit "before maturity, for value given," and continued to be such holder and owner until suit was brought.

We think the learned court rightly held that the affidavit of defense is insufficient.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS—EFFECT OF INDORSEMENT FOR COLLECTION.—The indorsement of a note "for collection" is notice to a purchaser that the indorsee is not the owner: *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40; 53 Am. Rep. 5, and note. An indorsement for collection does not pass the title or the right to the proceeds of the property, but simply makes the indorsee the agent of the holder: *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99; 32 Am. St. Rep. 332, and note; *National etc. Bank v. Hubbell*, 117 N. Y. 384; 15 Am. St. Rep. 515, and note. See the extended note to *First Nat. Bank v. Strauss*, 14 Am. St. Rep. 583, and also the note to *Adrian v. McCaskill*, 14 Am. St. Rep. 793. The indorsement of a draft for the purpose of collection passes the legal title so far only as to enable the indorsee to demand, receive, and sue for the money to be paid: *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass. 413; 21 Am. St. Rep. 461.

NEGOTIABLE INSTRUMENTS—DIVERSION OF ACCOMMODATION PAPER.—One who indorses a note to be used in a particular way takes the risk of its being used in another way or for another purpose, and is answerable thereon to any *bona fide* holder into whose hands it may come: *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666, and note; *Fearing v. Clark*, 16 Gray, 74; 77 Am. Dec. 394, and note; *Merchants' Nat. Bank v. Comstock*, 55 N. Y. 24; 14 Am. Rep. 163; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep.

620; *Park Bank v. Watson*, 42 N. Y. 490; 1 Am. Rep. 573; *Fellers v. Mercie Nat. Bank*, 34 Ind. 251; 7 Am. Rep. 225; *Clark v. Thayer*, 105 Mass. 218; 7 Am. Rep. 511; *Comstock v. Hier*, 73 N. Y. 269; 29 Am. Rep. 142. Where a note made and indorsed for accommodation, negotiable and payable at a certain bank, was not discounted there, but was sold to a private individual, the indorser is nevertheless liable: *Parker v. McDowell*, 95 N. C. 219; 50 Am. Rep. 235. See the extended note to *Altoona Nat. Bank v. Dunn*, 81 Am. St. Rep. 745, where this question is discussed at length.

SYLVESTER v. MAAG.

[155 PENNSYLVANIA STATE, 225.]

DOGS, LIABILITY OF OWNER OF.—If one lawfully on the premises of another is there bitten by a vicious and dangerous dog, kept by the occupier of the premises with knowledge of its nature and character, he is answerable for the injuries so sustained, although he had a notice posted in the lane leading to his house containing the warning "Beware of the Dogs."

TRESPASS to recover for injuries received from defendant's dogs. Defendant occupied certain premises as a tenant at will, and the plaintiff went there to notify the defendant of the sale of the premises and to take away certain signs which had been posted there to give notice of the owner's desire to sell. The defendant owned two dogs which had previously attacked people without provocation, of which fact he had knowledge. He had placed on a post in the lane leading to the house the sign "Beware of the Dogs." The plaintiff on knocking at the front door of the house received no response, and hearing voices at the rear of the house, he started in that direction and was attacked and severely bitten by the defendant's dogs. Verdict and judgment for the plaintiff.

Edward A. Anderson, for the appellant.

Bradbury Bedell, for the appellee.

PER CURIAM. The only assignment of error in this case is the refusal of the court to charge that, "under all the evidence the verdict of the jury must be for the defendant."

It is unnecessary to refer to the testimony further than to say that, among other things, it clearly tended to prove: 1. That plaintiff was lawfully on defendant's premises when he was bitten by the dog; and 2. That the dog, by which he was thus bitten, was a ferocious and dangerous animal, and the defendant then knew that such was its nature and character.

In submitting the case to the jury, the learned president of

the court below, in a very fair and impartial charge, instructed them, *inter alia*, that, in order to recover, the plaintiff must prove, substantially, the above-stated facts. Their verdict, in favor of the plaintiff, therefore, conclusively established both of said facts. The testimony not only warranted but required the submission of the case to the jury. It would have been plain error to have withdrawn it from their consideration by affirming defendant's point.

In view of the evidence, as to the nature and extent of plaintiff's injury, the damages awarded by the jury were quite moderate. Those who indulge in the luxury, or enjoy the convenience, of keeping, within the city limits, dogs which they know are ferocious and dangerous must see that they are so secured that persons lawfully going upon their premises or along the highways may not be bitten, or they must expect to suffer the consequences of their neglect to do so.

Judgment affirmed.

ANIMALS—LIABILITY OF OWNER FOR INJURY DONE BY VIOLENT DOG: See the extended notes to *Godeaux v. Blood*, 86 Am. Rep. 752, and *Knowles v. Mulder*, 16 Am. St. Rep. 631; also the notes to *Twigg v. Ryland*, 50 Am. Rep. 229, and *Laverne v. Mangianti*, 10 Am. Rep. 270, 271. One who enters the premises of another, through an open gate, on lawful business, and is bitten by ferocious dogs running at large, of which he has no notice, may recover of the owner, who knowing the vicious character of his dogs allows them to run loose on his premises: *Conway v. Grant*, 88 Ga. 40; 30 Am. St. Rep. 145 and note, and to the same effect, see *Brics v. Bauer*, 108 N. Y. 428; 2 Am. St. Rep. 454, and note.

SHIELDS v. CASEY.

[155 PENNSYLVANIA STATE, 252.]

CORPORATION.—SUBSCRIPTION TO STOCK OF A CORPORATION MADE BY DEFENDANT but to which he signed his wife's name instead of his own because he had some doubt about his right to take stock in such corporation is enforceable in an action against him.

ACTION against T. D. Casey to recover on a subscription to the stock of a brewing corporation. The evidence, admitted against the objection that it was incompetent, tended to show that when applied to for a stock subscription, defendant agreed to take stock to the extent of five thousand dollars, that he thereupon signed the name of M. J. Casey to the subscription and, on his attention being called to the signature, said that was his wife's name, and that he was not certain he

had the right to take stock in a brewing company for the reason that he was a wholesale liquor dealer. The court instructed the jury that if the defendant subscribed for himself in his wife's name, the plaintiff should recover. Verdict and judgment for the plaintiff.

J. Scott Ferguson and Waterson and Reid, for the appellant.
Pier and Blair, for the appellee.

PER CURIAM. We think the plaintiff's second point was correctly answered. It was affirmed. The court reserved the question, however, whether Casey subscribed to the stock for his wife, or for himself, with the instruction, that if the jury find that the subscription was for himself, although in his wife's name, they should find for the plaintiff, regardless of the point.

The evidence referred to in the fourth specification of error was directly in point. It tended to prove that the defendant subscribed for the stock for himself; that he signed the name of M. J. Casey, his wife, in order to cover up the transaction; that one reason for doing so was that he was a wholesale liquor dealer, and was not certain that he had a right to subscribe for stock in a brewing company.

It needs no argument to show that if this subscription was for himself, he could not avoid responsibility by placing it in the name of his wife. This question was fairly submitted to the jury.

Judgment affirmed.

AGENCY—ASSUMPTION OF AUTHORITY.—Where a contract is entered into by one assuming to act as agent of another, without having been authorized to make the contract, such pretended agent is personally liable in the precise terms of the contract: *Keener v. Harrod*, 2 Md. 63; 56 Am. Dec. 706, and note. An agent is personally liable on a note given by him in his principal's name without authority: *Rossiter v. Rossiter*, 8 Wend. 494; 24 Am. Dec. 62, and note; notes to *Hall v. Crandall*, 89 Am. Dec. 69; *Ogden v. Raymond*, 58 Am. Dec. 432; *Stone v. Wood*, 17 Am. Dec. 532, and *Underhill v. Gibson*, 9 Am. Dec. 88; also the extended notes to *Kames v. Swormstedt*, 2 Am. Rep. 332, and *Jefts v. York*, 50 Am. Dec. 793.

CORPORATIONS—SUBSCRIPTIONS FOR STOCK—LIABILITY OF SUBSCRIBERS. See the extended notes to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 823, and *Parker v. Thomas*, 81 Am. Dec. 393, where the question is thoroughly discussed.

FULLMER v. POUST.

[155 PENNSYLVANIA STATE, 275.]

CONTRACTS, WHEN SEVERABLE.—If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied under the law, such a contract will generally be held to be severable; but if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject thereof may consist of several distinct and wholly independent items.

MECHANIC'S LIEN WILL ATTACH TO AN EQUITABLE INTEREST in land held under a contract of purchase, and if such interest is afterwards enlarged into a fee, the lien may be asserted against the whole title.

MECHANIC'S LIEN MAY BE ASSERTED BY A VENDOR OF LAND when, by the same contract, he agreed to sell the land for a specified sum, and, for another amount, also specified, to erect a building thereon, and he subsequently made the conveyance and erected the building.

ACTION to enforce a mechanic's lien. The plaintiff and the defendant entered into a written contract whereby the former agreed to sell and the latter to buy a tract of land for two hundred and fifty dollars, and to make a conveyance on or before November 15, 1890. The plaintiff further agreed to erect a building on the same land for the further sum of two hundred and fifty dollars. On February 3, 1891, plaintiff made a conveyance of the property to the defendant. On May 9th of the same year plaintiff filed a mechanic's lien against the house and the land, such house having been completed by him December 27, 1890. The defendant claimed that the contract with plaintiff was a single, inseverable contract in which plaintiff participated as a vendor merely, and that he was not a mechanic entitled to a lien.

Judgment for the plaintiff.

Robert R. Little and E. H. Little, for the appellant.

Charles G. Barkley, John F. Harkins, and A. L. Frits, for the appellee.

PER CURIAM: While the plaintiff's agreement to sell and convey the lot to defendant for two hundred dollars, payable on or before November 15, 1890, and his covenant to build thereon for her a house, of the size, etc., therein specified, for the further consideration of two hundred and fifty dollars, payable, fifty dollars within thirty days, and the residue on May 15, 1891, etc., are written on the same paper, they do not necessarily constitute an entire contract. The former is so distinct from the latter, as to time of payment, etc., that

they may well be treated as severable. If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by the law, such a contract will generally be held to be severable. But, if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject thereof may consist of several distinct and wholly independent items: 2 Parsons on Contracts 29, 31; *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231; 33 Am. Rep. 753; *Graver v. Scott*, 80 Pa. St. 88; *Morgan v. McKee*, 77 Pa. St. 228. The distinction is clearly pointed out by the late Mr. Justice Williams in *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351.

The consideration for the lot was paid within the time specified in the contract, and, shortly thereafter, upon urgent demand of the defendant, the deed therefor was executed and delivered. The payments on the building contract were not all promptly made, and, within the time required by law, plaintiff filed a lien against the house, etc., and afterwards issued this *scire facias* thereon.

The contract to sell and convey vested in defendant an equitable interest in the lot, on which a mechanic's lien would attach. That equitable interest was enlarged into a fee by conveyance of the legal title; and the building covenant being severable from the contract to convey the lot, the plaintiff was clearly entitled to enforce his lien against the building, etc., for the purpose of collecting balance due him by defendant under the contract with her for erection of the house.

The specifications of error do not require special consideration. Neither of them is sustained.

Judgment affirmed.

CONTRACTS—WHEN SEVERABLE.—For instances of severable contracts, see the following cases: *Leonard v. Dyer*, 26 Conn. 172; 68 Am. Dec. 382; *Lorton v. Gilliam*, 1 Scam. 577; 33 Am. Dec. 430; *Patton v. Gilmer*, 42 Ala. 548; 94 Am. Dec. 665; *Mechanics' Nat. Bank v. Frazer*, 86 Ill. 133; 29 Am. Rep. 20; *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231; 33 Am. Rep. 753. A contract is not entire because embraced in one instrument, if it provides for the sale and purchase of different kinds of articles, and the prices are different and specific for each kind: *Pierson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831. See further the extended note to *Gill v. Benjamin*, 54 Am. Rep. 624. As to when contracts of insurance are severable, see *Coleman v. Insurance Co.*, 49 Ohio St. 310; 34 Am. St. Rep. 565, and note with the cases collected.

MECHANIC'S LIEN—WHETHER ATTACHES TO EQUITABLE INTEREST IN LAND.—A mechanic's lien will attach to whatever estate or interest in the premises the party for whom the building was erected may have, whether it be the fee, an estate for life or for years, or any interest legal or equitable in the land: *Paulsen v. Manabe*, 126 Ill. 72; 9 Am. St. Rep. 532 and extended note. And see especially the extended note to *Lyon v. McGuffey*, 45 Am. Dec. 678.

HOWARD v. TURNER.

[155 PENNSYLVANIA STATE, 349.]

CORPORATION—A SUBSCRIPTION TO BANK STOCK PROCURED BY MISREPRESENTATION is voidable only and can only be avoided subject to the rights of creditors where there is a winding up order or a voluntary winding up. The intervening rights of creditors and other stockholders call for prompt action on the part of a subscriber who seeks to avoid liability for his subscription on the ground of fraud.

CORPORATION—LACHES IN SEEKING TO AVOID A SUBSCRIPTION TO STOCK OF A BANK on the ground that it was procured by misrepresentation is fatal to the right of rescission. This rule was applied when, after a subscription to stock of a bank, it failed and a scheme was devised for its reorganization, and the subscriber participated in the proceedings looking to such reorganization, and did not undertake to rescind his subscription until after suit was brought on a note given thereon.

ASSUMPSIT on a promissory note. Defense that the note was given in payment for a subscription to stock in a banking corporation and that such subscription was procured by misrepresentation. Verdict and judgment for the defendant.

Thomas B. Taylor and Thomas W. Pierce, for the appellant.

Alfred P. Reid, R. E. Monaghan, and George B. Johnson, for the appellee.

STEBBETT, C. J. This suit is on a note admitted to have been made and delivered by defendant to the Newton National Bank in part renewal of his note for \$990 at ninety days from August 9, 1890, with interest, etc. The consideration of this last-mentioned note was nine shares of the increased capital stock of said bank taken by defendant in the name of his wife, Louisa E. Turner, under the following circumstances: In April, 1890, the bank—located and doing business at Newton, Kansas—decided to increase its capital from \$100,000 to \$200,000, and for that purpose authorized its cashier, C. R. McLain, to solicit subscriptions for said stock. In July following Mr. McLain came to Chester county, and, upon the faith of his representations, defendant, as the latter alleges,

verbally agreed to take, in his wife's name, nine shares of said new stock at \$110 per share, for which he gave said note of August 9, 1890. The transaction was to have been cash, but on August 5th defendant wrote that he had been disappointed in receipt of money, and suggested that, if satisfactory to the bank, he would make a note for the amount at ninety days with interest, and the certificate of stock might be held as collateral security. This proposition having been accepted, the note was forwarded and certificate of stock, No. 302, issued to Mrs. Turner, was deposited with her neighbor, Truman C. Moore, to be held for the bank as collateral security, etc. A certificate to that effect was given to Mrs. Turner.

In September following, the comptroller of the currency certified that said increased capital had been paid in, thus making the capital of the bank two hundred thousand dollars. On November 9th the note in suit was given for balance of the original note. On the 20th of the same month the bank failed, and a few days thereafter the plaintiff, J. E. Howard, was appointed receiver. At that time, the bank's condition, as shown by schedules filed with the comptroller of the currency, was:

"Total estimated assets.....	\$284,810 58
Total liabilities, not including capital..	270,272 57

"Apparent excess of assets.....\$14,538 01"

In January, 1891, a meeting of the stockholders was held at Newton, Kansas, for the purpose of ascertaining the amount, condition and character of the assets and liabilities of the bank, etc., and statement thereof was prepared by the secretary of the meeting. Pursuant to resolution then adopted, and with the view of reorganizing the bank, meetings were held in Philadelphia on the 16th and 17th of April, 1891, and resulted in a resolution to reorganize by a voluntary assessment of \$50.00 on each share of stock, and appointment of a stockholder's committee, of which Mr. F. T. Ives was chairman, to confer with the comptroller of the currency, and arrange details of reorganization. At a subsequent meeting held at Newton, May 20, 1891, it was further resolved to reduce the capital from \$200,000 to \$100,000, and on May 22d the prior proceedings of the stockholders were ratified, and the officers were authorized to issue new certificates of stock—one share for every two shares of old stock—to those who paid the \$50.00 per share assessment on the old stock, and all

stock on which said assessment was not paid by June 1, 1891, should be sold at public vendue on twelve days' notice. The bank, through said committee, had arranged with all its creditors, who were not paid in cash, to pay their respective claims in four equal installments, commencing September 1, 1891. All these preliminaries having been satisfactorily arranged, the receiver, on June 29, 1891, turned over to the reorganized bank all the assets, and thereupon business was resumed.

The defendant was present on first day of meeting in Philadelphia, but not on the following day when the reorganization scheme was adopted by the stockholders. Both he and his wife, however, corresponded on the subject with Mr. Ives, chairman of reorganization committee. Under date June 4, 1891, Mrs. Turner wrote: "I want or expect to pay my assessment of fifty per cent towards reorganizing the bank. But do not wish to send the amount until I know positively that you are going to reorganize," etc. Five days thereafter defendant wrote: "Mrs. L. E. Turner has nine shares of Newton National Bank stock. Should the bank be reorganized she will likely pay the assessment of fifty per cent. But, as she will have to borrow the money to do so, does not want to do that, unless it is a sure go. Kindly let me know how the bank stands at this time." Mr. Ives replied to both of these communications. To the latter he says, under date of June 17th: "The letter received here from Mrs. L. E. Turner was answered, informing her that the subscriptions were all in for the one hundred thousand dollars but hers and two others. One of the others is already remitted and the other is expected daily. In order to facilitate opening the bank and relieve suspense of stockholders I put in the difference required, expecting it returned to me soon enough not to afford much inconvenience." Replying to the letter addressed to herself, Mrs. Turner, under date June 29th, says: "On or about the day I received your letter, some two or three weeks ago, Mr. Howard, receiver for the Newton National Bank, brought suit against Mr. Turner and blocked matters for the present."

In answer to notice sent by the receiver in January, 1891, defendant, referring to the note in suit, says under date January 19th: "This note was given by me for stock for Louisa E. Turner . . . I will not be able to meet the note in full. . . . Now I am willing, if you can receive a new note when due,

paying part of it, and will pay balance in full 60 to 90 days from that time."

It also appears that in November, 1890, after the bank failed, Mr. Moore, the custodian of the certificate, offered it to the defendant; and the latter, in answer to the question whether he received it or not, testified: "It was left lying on the table; I suppose I accepted it."

The foregoing are the salient facts, as to the origin, consideration, etc., of the note in suit, leading up to the defense that was successfully interposed in the court below, viz: that the agreement to take the stock, giving the original note in payment thereof, etc., was induced by the fraudulent misrepresentations of the cashier as agent of the bank in procuring subscriptions, etc.

Without referring to the alleged misrepresentations, but assuming, for argument's sake merely, that they were such as would have justified the defendant in rescinding the contract before the bank became insolvent or other rights attached, the controlling question under all the evidence is whether that defense was available at the time it was interposed.

As a general rule, it is well settled that a contract induced by fraud is not void, but voidable only at the option of the party defrauded. In other words, it is valid until rescinded, and it is for the defrauded party to elect whether he will be bound; but, if he affirm the contract, he must affirm it in all its terms: *Pollock on Contracts*, *536; *Pearsoll v. Chapin*, 44 Pa. St. 9. When, however, the fraud is of such a character as to involve a crime, ratification thereof is contrary to public policy, and cannot be permitted; but where the transaction is merely contrary to good faith and fair dealing—where it affects individual interests only—either ratification or rescission, at the election of the party defrauded, is permissible: *Shisler v. Vandike*, 92 Pa. St. 447; 37 Am. Rep. 702; *Babcock v. Case*, 61 Pa. St. 431; 100 Am. Dec. 654; *Leaming v. Wiss*, 73 Pa. St. 173. In the last case it is said if defendants were guilty of the alleged fraud, the plaintiffs, on discovering it, had an undoubted right to rescind the contract, and upon a tender of the stocks, to demand back the price paid for them, but it was their duty to do so within a reasonable time. Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract. Election to rescind must be communicated to the

other party. One way of doing that is to institute proceedings to have the contract judicially set aside; or, if the other party is the first to sue on the contract, the rescission, if not too late, may be set up as a defense. Where rescission is not declared in judicial proceedings, no further rule can be laid down than that there should be "prompt repudiation and restitution as far as possible."

A contract to take and pay for stock in a corporation, made in consequence of a fraudulent prospectus, is voidable only and not void, and can only be avoided, subject to the rights of creditors, where there is a winding-up order or a voluntary winding up: Bispham's Equity, sec. 472; 2 Addison on Contracts, 8th ed., 774; Cook on Stock and Stockholders, secs. 151-154. The intervening rights of creditors and other stockholders call for prompt action on the part of a subscriber who seeks to avoid his liability on the ground of fraud: Bispham's Equity, sec. 154.

In view of these principles and the uncontradicted facts above referred to, it is impossible to see any ground on which a valid defense in this case could be based. The undisputed evidence is that prior to the failure of the bank and institution of this suit by the receiver, neither the defendant nor his wife took any steps to rescind or repudiate the contract of subscription or to surrender the certificate of stock, as to which he testified, "It was left on the table; I suppose I accepted it"; nor did he deny his liability on the note. On the contrary, up to the time suit was brought, they both indicated a willingness to join with other shareholders in their efforts to reorganize the bank. Mrs. Turner, as we have seen, wrote to the chairman of the reorganization committee: "I want or expect to pay my fifty per cent towards reorganizing the bank; but do not wish to send the amount until I know positively that you are going to reorganize," etc. A few days thereafter defendant wrote to the same effect, saying his wife would likely pay the assessment "should the bank be reorganized," but she did not want to borrow the money for that purpose "unless it is a sure go." At that time, as the chairman wrote them in reply, the whole amount of the assessment, one hundred thousand dollars, except Mrs. Turner's and two others, was in, and one of those was on the way. Reorganization was then practically an accomplished fact. Everything, including the conduct of defendant and his wife, pointed to that conclusion; and doubtless the remittance

would have been made if the receiver had not brought suit in the mean time. That, as Mrs. Turner wrote, "blocked matters for the present." In nothing that was said or done, from the beginning up to that time, was there anything that could be tortured into election to rescind on the part of the defendant. At that time, or rather prior thereto, the rights of the bank's creditors to the extent of its assets, including the additional capital stock represented in part by defendant's note, had attached; the stockholders, with the exception of Mrs. Turner and one or two others, relying on obtaining possession of all the assets, had contributed nearly one hundred thousand dollars for the purpose of reorganizing the bank, which of course included settlement and payment of all its liabilities. These facts were established by uncontroverted evidence. There was no testimony from which any jury could or ought to be permitted to find a state of facts more favorable to the defendant.

Plaintiff's second, third, fourth, and sixth points for charge are substantially predicated of the foregoing undisputed facts, and should have been, respectively, affirmed without qualification, and the jury instructed, as requested in the sixth, that "upon all the evidence in the cause the verdict should be for the plaintiff."

It follows from what has been said that there was error also in the learned judge's answers to defendant's seventh and eighth points respectively. The third to eighth specifications of error inclusive are therefore sustained.

Judgment reversed and a venire *facias de novo* awarded.

CORPORATIONS—SUBSCRIPTIONS OF STOCK—RELEASE OF SUBSCRIBER FOR FRAUD.—This question is thoroughly discussed in the notes to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 824-826; and *Parker v. Thomas*, 81 Am. Dec. 401.

TAGG v. McGEORGE.

[155 PENNSYLVANIA STATE, 803.]

MASTER AND SERVANT—INSTRUCTIONS TO MINOR EMPLOYEES.—When young persons, without experience, are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them, and warnings as to the hazard of carelessness in their use. If the employer neglects this duty, or if he gives improper instructions, he is answerable for the injury resulting from this neglect of duty.

JURY TRIAL.—An instruction to a jury which incorrectly or inadvertently uses a word will not require the reversal of the judgment if the law was plainly and correctly stated in several other instructions.

MASTER AND SERVANT—NEGLIGENCE ARISING FROM HASTE.—If a minor employee is directed by his foreman to hurry in the doing of dangerous work, and is injured while complying with such instruction, the risk of injury being increased through his haste, such employee may recover for injuries thus received, if he was not aware of the danger, and his will, being subject to that of the foreman, he obeyed him because he thought the foreman knew better, or because he was afraid to disobey.

TRESPASS for personal injuries. Verdict and judgment for the plaintiff.

Isaac Johnson, for the appellants.

V. Gilpin Robinson and Ray W. Jones, for the appellee.

DEAN, J. William F. Tagg, a boy past thirteen years of age, was employed by defendants in their woolen-mill at Darby, Delaware county. He went to work with the consent of, and by contract with, his father, who worked in the same mill; the boy commenced on October 10, 1887, piecing at what is known as a woolen mule; his wages were fixed at two dollars per week; the usual wages of a piecer are about six dollars. There was evidence tending to show that Henry T. Kent, one of defendants, made the contract for employment, and then put the boy in charge of Charles Chadwick, who had been foreman in the mill for many years. Under his directions and control he remained as a piecer at the mule up until the 31st of December, 1887. About twelve o'clock of that day, while cleaning the machine with waste, it being then running, the waste caught in the wheels, his hand was drawn in, and so completely crushed that amputation was necessary.

The plaintiff then brought suit to recover damages, averring negligence on part of defendants which resulted in the injury: 1. In putting a young and inexperienced boy to work at dangerous machinery without explaining to him its character, or

warning him of its danger; and, 2. In directing him by the foreman, Chadwick, to hurriedly clean the machine while it was running, without informing him of the peculiar danger incident to such work.

The law applicable to the issue is well settled. In the text-books, and with rare exceptions in all the adjudicated cases, the rule laid down in substance is: When young persons without experience are employed to work with dangerous machines it is the duty of the employer to give suitable instructions as to the manner of using them, and warning as to the hazard of carelessness in their use; if the employer neglects this duty, or if he give improper instructions, he is responsible for the injury resulting from his neglect of duty.

He is not answerable for injury to adults; nor for injuries to young persons who have had that experience from which knowledge of danger may reasonably be presumed, and that discretion which prompts to care.

The cases cited by counsel for appellant are not in conflict with this rule. In *Zurn v. Tetlow*, 134 Pa. St. 213, the boy was between fourteen and fifteen, and had received such instructions from the foreman as were necessary to the nature of his employment. In *O'Keefe v. Thorn*, 24 Week. Not. 879, the boy was over fourteen; he was employed to shove tin plates under a stamping-machine, and was injured by thrusting his hand under the stamp; the machine was not dangerous; the consequence of putting the hand under the stamp was as obvious to a boy of fourteen as to a man of forty.

There has been no departure by this court from the law so clearly and concisely stated by our brother Williams in *Rummel v. Dilworth*, 131 Pa. St. 509, 17 Am. St. Rep. 827: "In the case of young persons it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate and to which they should not be exposed. The duty in such cases to warn and instruct grows naturally out of the ignorance and inexperience of the employee, and it does not extend to those who are of mature years and who are familiar with the employment and its risks."

This was the law, as stated in terms that could not be misunderstood by the court below to the jury. There was evidence tending to show that the woolen mule was a dangerous piece of machinery even to the adult workman, and that it was highly dangerous to one attempting to clean it while run-

ning. As to whether the boy had received any instructions from the foreman, or had by experience or in any other way acquired a knowledge of the machine and the danger of attempting to clean it while running, there was conflicting evidence. It was of that character that the jury alone could determine the truth, and it was with proper instructions submitted to them. They were told explicitly, more than once, that if the boy, by instructions and warning from the foreman, or by information from others, or by experience while tending the machine, had knowledge of its dangerous character there could be no recovery.

Complaint is made of the answer of the court to plaintiffs' second point, because of the use of the word "perhaps." The point, in effect, requested the court to say that, if the jury found the boy to be young and inexperienced, it was the duty of defendants to explain to him the danger. The answer was: "I affirm that point, gentlemen, also with the qualification, perhaps, that if he had that experience from any other source, then it would not be necessary." It is argued, that the direction should have been positive and peremptory, that if he had the experience, no matter where obtained, instructions and warning on part of the foreman were immaterial, and there could be no recovery. Picking out this single word, and assuming that plaintiffs' second point embraced all the instructions upon that subject to the jury, it is liable to the charge of error. But, taking this answer in connection with what was said in other portions of the charge, there was no room for misunderstanding on the part of the jury. In the body of the charge this pointed language is used:

"You are first to find whether this boy had knowledge, either by previous experience either at Wolfenden's, or any other place, or by knowledge obtained while he was operating this machine after running it two or three months, that it was dangerous. Now if he knew it was dangerous to attempt to clean that machine while it was in operation then he cannot recover." This same positive instruction, in substantially the same language, was given three times in the general charge and the same idea or thought is expressed in five of the nine answers to plaintiffs' points. In view of this oft-repeated correct statement of the law, we must assume that the jury could not have been misled by a single inadvertent use of a word which did not express correctly the meaning of the court.

So far as concerns the general rule applicable to employers and young and inexperienced employees, the law was plainly and correctly stated to the jury; the contradictory evidence was impartially submitted to them that they might find whether it was a fact that the employment, cleaning a running machine of this character, was dangerous; whether the boy was ignorant and inexperienced, and whether the employer had failed in duty in not instructing or warning him. This disposes of appellants' first, second, third, sixth, and seventh assignments of error: no one of them is sustained.

The fourth and fifth assignments are to the answers of the court to plaintiffs' fourth and fifth points. There was evidence on part of the plaintiff tending to show that another boy named Tower at another machine, just before the accident, had been taken away, and that the foreman Chadwick said to Tagg, "Hurry up, now, for when you get done cleaning yours, you have to do Tower's afterwards." It was argued that here was an exacting master urging a young boy to the hurried performance of dangerous work, cleaning a machine while in motion, and imposing on him a double duty; if the boy obeyed the command of the master, necessarily the danger was largely increased by a hurried and excited performance of the work. If the evidence satisfied the jury these facts had been proven, then the plaintiffs asked the court to further instruct the jury that, if the injury happened in the effort of the boy to obey the unreasonable command of the master, their verdict should be for the plaintiff. The court, in answer to the request, said that if the boy was not aware of the danger, and, his will being subject to that of the foreman, he obeyed him because he thought the foreman knew better, or because he was afraid to disobey, then they should find for the plaintiff.

This instruction was exactly in accord with the law as held by this court in *Lee v. Woolsey*, 109 Pa. St. 124; and *Kehler v. Schwenk*, 151 Pa. St. 519; 31 Am. St. Rep. 777. In the case first cited, an adult employee was called upon by the master to execute in haste a dangerous duty, and it was said he could not be supposed to remember at the moment a danger of which he may have had previous knowledge. It would be unreasonable to demand of him the same care which would be expected in cooler moments, or in a more deliberate performance of the task. In *Kehler v. Schwenk*, 151 Pa. St. 519, 31 Am. St. Rep. 777, the case of a boy over fourteen, in

an opinion by our brother Green, we said: "He could not be expected to have the will power of a full-grown man in resisting his master's orders. He cannot be held, therefore, as one who voluntarily engages in a dangerous service, especially by a master who specifically directed him to do the hazardous work."

Therefore, finding nothing of merit in any of the assignments of error, the judgment is affirmed, and appeal dismissed at costs of appellants.

APPEAL—INCORRECT INSTRUCTION WHEN NOT REVERSIBLE ERROR.—The whole of a judge's charge to the jury must be considered together, and where, when so considered, it correctly states the law, it will be upheld, though a particular sentence thereof, if considered by itself, might be open to objection: *State v. Levelle*, 34 S. C. 120; 27 Am. St. Rep. 799; *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65; *Hemmingway v. Chicago etc. Ry. Co.*, 72 Wis. 42; 7 Am. St. Rep. 823; *Shively v. Cedar Rapids etc. Ry. Co.*, 74 Iowa, 169; 7 Am. St. Rep. 471, and note; *Louisville etc. Ry. Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432.

MASTER AND SERVANT—DANGEROUS MACHINERY—DUTY TO INSTRUCT MINOR SERVANT.—Employers owe it as a duty to inexperienced and infant employees to point out the dangers of which they themselves have or ought to have knowledge, and to give such warnings as may lead to the avoidance of injury by the exercise of reasonable care: *Chicago etc. Brick Co. v. Reininger*, 140 Ill. 834; 33 Am. St. Rep. 249, and note; *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777, and note; see also the notes to *Wagner v. Jayne Chemical Co.*, 30 Am. St. Rep. 750, and *Shortel v. St. Joseph*, 24 Am. St. Rep. 322.

ADAMS RADIATOR AND BOILER WORKS v. SCHNADER.

[155 PENNSYLVANIA STATE, 394.]

CONTRACT GUARANTEEING THAT A HEATER SHOULD GIVE ENTIRE SATISFACTION in its operation and that, should it prove unsatisfactory, after a fair and reasonable trial, it should be removed, is not complied with by constructing a heater of the dimensions and materials stipulated for in the contract, if, notwithstanding such contract, the other party is not satisfied with it. It is not sufficient that it is satisfactory to others, or that he ought to be satisfied with it, provided his dissatisfaction is genuine and not capricious nor dishonest.

CONTRACT THAT A HEATER SHOULD HAVE A FAIR AND REASONABLE TRIAL contemplates a trial by the householder under the supervision and attendance of the ordinary household servants. It is not expected that he will daily employ skilled plumbers and engineers to operate it.

A CONTRACT TO CONSTRUCT A HEATER TO THE SATISFACTION OF A PARTY, on his death before the heater has been tested, is not complied with if the heater is not satisfactory to his executor and devisee by whom it is tested.

ASSUMPSIT for a heater. Judgment for the plaintiff.

Richmond L. Jones and E. B. Weigand, for the appellant.

Philip S. Zeiber, Baer and Snyder, for the appellees.

DEAN, J. Davis C. Schnader, defendant's testator, the owner of a dwelling-house then being built, on the 24th of August, 1889, made a written contract with plaintiffs that they should furnish this house with a steam heater. Among other stipulations is this one:

"We [plaintiffs] guarantee this apparatus for heating by steam to be constructed in a good, thorough, and workmanlike manner, to give entire satisfaction in its operation, and to work entirely noiseless. Should it prove unsatisfactory, after a thorough and reasonable trial, we will remove it at our expense, refund the moneys paid to us on account of it, and will place the building in as good a condition as it was when we received it for the purpose of erecting our steam-heating apparatus. We will furnish said steam-heating apparatus complete in all its details for the sum of four hundred and eighty-two dollars, one-half to be paid on completion of the work, and the remainder in sixty days thereafter."

The specifications of kind and size of materials to be used in the construction are elaborate. We do not deem them, so far as this issue is concerned, very material, for the case turns on the construction to be given that stipulation in the agreement just quoted.

Mr. Schnader moved into his house on Tuesday of the last week in March, 1890, and died on the following Saturday. By his last will, duly proven, he devised the dwelling-house to his son, Milton H. Schnader, his executor and this defendant, subject to a life estate in his widow. Before his death, and before the heater, by use for a reasonable time, had been tested, he paid to plaintiffs about one-half the price.

Milton H. Schnader, son, executor, and devisee, was in the house with his father for the four days of his last illness, and continued to live there with his mother. He testified that the heater was wholly unsatisfactory to him from the day it was first started: failed to heat the rooms. He notified plaintiffs of this when they demanded payment of the last installment of the price, and asked them to defer collection until the following December, when the weather would be colder, and a better test could be made. This they declined to do, and proposed that James N. Scheible, a plumber, should

make an examination of the heater; this was concurred in by Schnader, and the last of June or first of July Scheible fired it up, and it worked satisfactorily to him, Scheible, on that day, at that season of the year. But Schnader was not satisfied, and on the 6th of September, in response to plaintiffs' written demand of August 25th for immediate payment, requested them to remove the heater from his premises. The plaintiffs then brought suit for two hundred and seventy-four dollars and three cents, the unpaid balance of their contract price.

At the trial plaintiffs averred complete performance of their contract according to its terms: defendant denied this. There was considerable evidence adduced on both sides as to the quality and capability of the heater, which was submitted to the jury by the learned court below, on the theory or construction of the agreement, that if plaintiffs performed their contract according to the specifications to their own satisfaction and that of the jury then they should have a verdict. This instruction the appellant's seven assignments of error complain of.

What is a reasonable interpretation of the contract of plaintiffs when they say, "We guarantee this apparatus to give entire satisfaction in its operation, and should it prove unsatisfactory, after a thorough and reasonable trial, we will remove it at our expense"? It must be kept in mind that this was not a piece of machinery designed to accomplish some single or particular purpose in which power and durability alone constitute desirability or satisfactoriness. A sawmill may be warranted as of a capacity to cut a certain quantity of lumber per day; a locomotive may be warranted to draw a certain number of tons up a certain grade or around a certain curve; and if there be a guaranty that they shall give satisfaction it can reasonably be presumed that the specified power was all that was within the mind of the parties when they contracted. But when the subject of the contract is household furniture, as in *McCarren v. McNulty*, 7 Gray, 139; or for a suit of clothes, as in *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463; or for a work of art, as in *Hoffman v. Gallaher*, 6 Daly, 42; and *Zaleski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446, the question is not whether the thing contracted for had a certain strength or a particular dimension as specified in the contract, but there come in to make up satisfaction or dissatisfaction those qualities which please or those defects

which are nothing more than annoying. A dwelling-house heater is in use every hour of the day and night; is absolutely indispensable to the health and comfort of the householder and his family; if all the iron and brick work be made as specified; the valves, gauge-cocks, radiators, boilers, and all other parts measure as set out in the contract; and if, even on one day in the middle of summer on being fired up and operated by an expert plumber, a degree of heat is attained which, in his opinion, comes up to the point fixed in the contract, these facts would not of themselves determine that it was satisfactory to the man who was to use it in zero weather. If in its ordinary every-day use in heating his house, instead of satisfying him, it was, as he testifies, a constant vexation, we think he was not bound to keep and pay for it.

The reasonable interpretation of the contract is, that Schnader was to be satisfied with the heater; not the plaintiffs; not the plumber, nor other witnesses; not the jury. As is said in *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446, "It is not enough to say that she (the defendant) ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, not the court, is entitled to judge of that. The contract was not to make one she ought to be satisfied with, but one she would be satisfied with."

The rule laid down by this court in *Singerly v. Thayer*, 108 Pa. St. 291, 56 Am. Rep. 207, is to the same effect, and is clearly applicable to this contract and this evidence. The court says "He (the defendant) therefore was the person to decide, and to declare whether it was satisfactory. He did not agree to accept what might be satisfactory to others, but what was satisfactory to himself. This was the fact which the contract gave him the right to decide. He was the person who was to test and use it. No other persons could intelligently determine whether in every respect he was satisfied therewith."

The appellee's counsel argue that there is a distinction between this contract and the one in *Singerly v. Thayer*, 108 Pa. St. 291; 56 Am. Rep. 207. In the contract before us, plaintiffs agree to remove the heater "should it prove unsatisfactory after a thorough and reasonable trial," while there are no such words in the *Singerly* and *Thayer* contract. But the plaintiffs on the trial alleged, and offered evidence to prove, that at their suggestion, and by consent of defendant, a test trial was given this heater in June or July. Mr. Adams, for

the plaintiff, testified that the trial demonstrated he had complied with his contract: that is his opinion. He admits that a trial at that time of the year would be a theoretical not a practical one.

The defendant concedes that on that trial it worked better than it usually did, but he was not convinced it would work satisfactorily to him in cold weather. The fair presumption is that the "thorough and reasonable trial" contemplated by the parties was its use by the householder under the supervision and attendance of the ordinary household servants. It was not expected the purchaser would daily employ skilled plumbers or engineers to operate it. In this ordinary and expected use of it from March until June it was unsatisfactory to Schnader; after the trial test made by the expert Scheible, in presence of Adams and Schnader, in summer, it still was not satisfactory; was so unsatisfactory that Schnader offered to forfeit all he had paid if plaintiffs would take the heater out.

Of course defendant's dissatisfaction must be genuine, as distinguished from mere caprice or dishonesty; he could not have ordered the heater taken out without a trial by the ordinary methods and service of the householder; nor, for the purpose of evading payment of the balance of the price, could a dishonest declaration of dissatisfaction have been an effectual defense. But there is no evidence of want of good faith in his conduct; he has a right to defend on the ground that the heater does not work satisfactorily to him, after what he considered a thorough and reasonable trial by the ordinary use of it for more than two months, and especially after the test trial proposed by plaintiffs.

In substance, the court below submitted it as a question of fact for the jury to find from the evidence whether he ought to have been satisfied; this was an erroneous interpretation of the contract. The proper interpretation is: 1. Was there a thorough and reasonable trial of the heater by the ordinary daily use of it? and 2. Was the defendant then dissatisfied with it? If he was dissatisfied after such trial then the plaintiff cannot recover. Neither the plaintiff, jury, nor witnesses ought to be permitted to make a contract for him; his contract was that he was to be satisfied, and plaintiffs must perform their contract in this particular the same as in the item of putting in boilers.

Plaintiff's counsel further argue that the judgment should

be affirmed, because this contract was personal alone to D. C. Schnader, defendant's father, who died four days after the heater was put in the house; as he does not survive to indicate dissatisfaction, the defendant has no authority to do so. The plaintiffs raised no such question in the court below, so far as can be learned from the charge or the points presented; but, as the case goes back for retrial, it is best we should here briefly pass upon it.

It would rather lack equality to hold that the contract liability for the price passed to the executor and devisee, but the right to insist on performance died with the testator; neither reason nor law imposes upon us such a decision. If D. C. Schnader had lived to make such trial of the heater as was intended by the contract, and had expressed no dissatisfaction with it, there would be a conclusive presumption of plaintiffs' complete performance; but as he died almost immediately after it was put in, his executor and devisee has the right to set up the same defense as the testator might have done had he lived. It was not a contract for a suit of clothes, or for a set of artificial teeth, which could be satisfactory to but one person, but for a heater, which was to be satisfactory to the occupant of the house where it was to be put up: death and the last will have made this defendant the occupant, and he has the right to insist that the heater shall work satisfactorily to him, as he has succeeded not only to the property, but to the personal use of it.

The defendant's first assignment of error to the refusal of the court to instruct as requested in first point: "That under the law the contract of August 24, 1889, is a guaranty or warranty that the apparatus would work to the satisfaction of Davis C. Schnader, deceased, and that, if the evidence is believed that as executor he fairly and reasonably tried and tested the apparatus and was dissatisfied with it, and so notified plaintiffs, there can be no recovery," is sustained. This in effect disposes of all the other assignments.

The judgment is reversed, and a *venire facias de novo* awarded.

CONTRACTS, OPTIONAL AND ALTERNATIVE.—If an article is delivered to a purchaser to be retained and paid for by him, if satisfactory, the purchaser may repudiate the sale if such article prove *bona fide* in fact unsatisfactory. Note to *Duplex etc. Boiler Co. v. Garden*, 54 Am. Rep. 715, 717; *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463; *Zaleski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446. A contract for a portrait to be "satisfactory" to the cus-

owner gives him the option of refusing it at his pleasure: *Gibson v. Cranage*, 39 Mich. 49; 33 Am. Rep. 351, and extended note. See the extended note to *Cherry v. Smith*, 39 Am. Dec. 152. A contract to do work upon property to the entire satisfaction of the owner, and in the best workmanlike manner, is satisfied by doing such work in a good and workmanlike manner. The owner cannot avoid payment by arbitrarily saying that he is not satisfied: *Doll v. Noble*, 116 N. Y. 230; 15 Am. St. Rep. 398, and note.

JANES v. BENSON.

[155 PENNSYLVANIA STATE, 489.]

PROMISSORY NOTE.—A TRANSFEREE OF A NON-NEGOTIABLE NOTE is not bound to inquire of the maker whether any defenses exist against it, and failing to do so, he stands exactly in the shoes of the person from whom he receives it. If that person could not recover, the transferee cannot.

NOTE, CHANGE OF PAYEE.—A SEALED NOTE PAYABLE TO A PARTICULAR PERSON and made for a specific purpose and not negotiable in form cannot, without the consent of the surety thereon, be delivered to another person on the payee named therein refusing to accept it, and any person receiving it other than the original payee is chargeable with notice of any defenses existing against it.

SURETY, RELEASE OF BY CHANGE OF PAYEE.—If a surety signs a note payable to A, who declines to receive it, and it is then negotiated to B, such change in the payee, if made without the knowledge or consent of the surety, releases him from liability.

ASSUMPSIT against a surety on a sealed note. Judgment for plaintiff.

S. M. Brainerd and John P. Vincent, for the appellants.

J. W. Sproul, for the appellee.

WILLIAMS, J. The question in this case is over the plaintiff's title to the instrument sued on, and it is raised by a somewhat novel state of facts. The evidence shows that Mrs. Edwards applied to William Benson, now deceased, for a loan of money upon the security of her own note. He declined to lend the money, but offered to assist her in borrowing it. He told her he thought Mr. Janes would lend it to her on proper security, and that he would sign her note as surety to enable her to make the loan of him. He accordingly prepared a note at eight months, payable to Janes or order, for one hundred dollars, containing a confession of judgment, which both Mrs. Edwards and himself signed and sealed. She then went to Mr. Janes with the note and applied for the loan of one hundred dollars. He examined the note and told her that

the security was sufficient, but that he had just disposed of all his ready money and could not therefore accommodate her. He suggested the names of several persons to whom it would be desirable for her to apply, among whom was the firm in whose name as use plaintiff this action is brought. She went to Patterson and told him what she wanted, and offered him the note payable to Janes which Benson had signed as surety. He took the note and gave her the money. It was not paid at maturity. This action against Mrs. Edwards and the executor of the surety who was deceased was brought in the name of Janes for their use. The executor denies that his testator ever undertook to become surety for Mrs. Edwards to any person except to Mr. Janes, and as Janes declined to accept the note or make the loan upon it, the note was *functus officio* when that negotiation failed. This line of defense was brought to the attention of the learned judge by the defendant's first point, in answer to which he instructed the jury as follows: "The note or obligation in this suit is a specialty. It might be transferred by the payee by delivery with intention to transfer the title. It is not necessary that the payee actually owned the note, if the transferee was not informed of the want of ownership in the payee." He then submitted the case to the jury upon the question of the character of the delivery of the note to Patterson by Mrs. Edwards, telling them, "If that was done in the presence of Mr. Janes, and with his knowledge and consent, you would be justified in treating that fact as evidence that it was done by the authority of Mr. Janes, and that is the question for you to determine." This instruction was erroneous. The rule is, that the transferee of a non-negotiable instrument is bound to inquire of the maker, and failing to do so he stands exactly in the shoes of the person from whom he receives it. If that person could not recover, the transferee cannot: *Eldred v. Hazlett*, 33 Pa. St. 307; *Dean v. Herrold*, 37 Pa. St. 150; *Lane v. Smith*, 103 Pa. St. 416. It is not enough that the transferee "was not informed of the want of ownership in the payee," for he was bound to inquire what defense the maker had to the instrument, and to know that the character of the transaction out of which the note arose was open to investigation. If he "was not informed," it was because he did not make inquiry of the maker which it was his duty to do. The instrument being non-negotiable was notice to him of all that he could have learned by inquiry. We must, therefore, hold

that he was informed of the nature of the transaction, of the object and purpose of the note, and of the fact that the payee had declined to take it; and that it was consequently impossible for Mrs. Edwards to change the payee or dispose of the obligation to a stranger without Benson's consent. If Benson had intended to become surety for Mrs. Edwards, upon an obligation that was to be hawked about in search of a buyer, he would have made it payable to bearer, or left the name of the payee a blank to be filled when the buyer of the instrument was found. But he made the note payable to Janes from whom he expected the loan would be made, and to whom he sent Mrs. Edwards. Had Janes made the loan, and so become the owner of the note, he could have transferred it by his indorsement. He did not make the loan. He did not indorse the note. He did not, in the language of the court below, "deliver it with intent to pass title," and he had no title to pass. Mrs. Edwards delivered the note to the plaintiffs, and if the plaintiffs have a title it is derived from her. The appellees seek to show that she could pass a good title to them by invoking the rules applicable to accommodation paper; and they argue that Benson is in the position of an accommodation maker, and cannot now complain of the use the holder may choose to make of the instrument. But it must be remembered that the note is not negotiable in form. It is a sealed obligation, payable to a particular person, for a particular purpose. That purpose failed when the payee declined to make the loan it was intended to secure. When this note was offered to a stranger to it he was bound to take notice of the fact that it was a non-negotiable instrument, and payable to another person. The character of the instrument put him on inquiry. All that inquiry made of Benson would have disclosed as to the object of the instrument the character of the transaction out of which it grew, and the extent of the authority of Mrs. Edwards to make use of it, the appellants must be held to have known when they took it from Mrs. Edwards.

But it is said Benson clothed Mrs. Edwards with authority to use the note as she pleased by the mere fact of signing it for the purpose of assisting her to obtain a loan. The answer made to this position is that the note, and the evidence relating to the circumstances under which it was given, show a purpose to aid her in procuring the money from the person named as the payee. There is nothing in the form of the

instrument, or in the testimony, to indicate a purpose on his part to go a step further than to assume the position of surety for her to Mr. Janes. Mr. Janes, however, did not make the loan. Mr. Benson was not consulted in regard to becoming liable to any other person. He might have had good reasons for declining to permit his obligation to go into other hands than those he had selected and named as payee. He would unquestionably have had a right, if Mrs. Edwards had asked permission to deliver the note to any person from whom she could obtain the money, to say to her: "No, there are persons into whose hands I would not consent that my obligation should go. You must not use it for any purpose, or with any person, except in accordance with the tenor of the instrument, and the understanding between us." She did not consult him. The appellants did not inquire of him. The payee never became the owner, and never attempted to pass title to anyone else. Mrs. Edwards, so far as the evidence indicates, obtained the note for the purpose of making a loan from Mr. Janes, and when she found herself unable to use it for that purpose she used it for another. Under such circumstances no liability was imposed upon Benson, and the judgment must be reversed. The plaintiff is entitled to a judgment against Mrs. Edwards so far as we can now see, and a *venire facias de novo* must be awarded.

SURETSHIP—WHAT WILL RELEASE SURETY.—A surety has a right to stand upon the strict terms of his obligation: *Shreffler v. Nadehofer*, 133 Ill. 536; 23 Am. St. Rep. 626, and note; *Anderson v. Bellenger*, 87 Ala. 334; 13 Am. St. Rep. 46. See also the extended note to *First Nat. Bank v. Gerke*, 6 Am. St. Rep. 458, and *Scott v. Fisher*, 110 N. C. 311; 28 Am. St. Rep. 688, and note with the cases collected. A sealed note with several sureties was executed and offered by the maker to the payee, who refused to accept it unless the words "interest to be paid semi-annually" were inserted. The maker thereupon, without the knowledge of the sureties, wrote the words in the note as required, and it was held that the sureties were discharged from liability: *Neff v. Horner*, 63 Pa. St. 327; 3 Am. Rep. 555.

NON-NEGOTIABLE INSTRUMENTS—RIGHTS OF TRANSFEREE.—The maker of a non-negotiable note may defeat a recovery by one to whom it has been assigned for value by showing want of consideration: *Wetter v. Kiley*, 95 Pa. St. 461; 40 Am. Rep. 670; and see *Jaqua v. Montgomery*, 33 Ind. 36; 5 Am. Rep. 168. The consideration between the assignor and the assignee need not be proved in an action by the assignee against the maker of a non-negotiable note: *Tibbets v. Gerrish*, 25 N. H. 41; 57 Am. Dec. 307, and note.

GOODYEAR v. BROWN.

[155 PENNSYLVANIA STATE, 514.]

PUBLIC OFFICERS.—DEALINGS BETWEEN A PUBLIC OFFICER AND HIMSELF AS A PRIVATE CITIZEN which bring him into collision with other citizens, equally interested with himself in the integrity and impartiality of the office, are against public policy.

PUBLIC OFFICERS—DISQUALIFICATION TO ACT WHERE THEY ARE INTERESTED.—A DEPUTY secretary of internal affairs, whose duties are analogous to those of a deputy surveyor-general, will not be allowed to apply for and take measures necessary to acquire title to, a tract of public land. Public policy cannot tolerate such dealings by an officer with his own department or office.

EJECTMENT. Judgment for defendant.

C. L. Peck and S. R. Peale, Benson and Seibert, for the appellant.

Henry C. McCormick, H. C. Dornan, Lewis and Leonard, and Mann and Ormerod, for the appellee.

WILLIAMS, J. It is true, as the appellants contend, that there is no enactment to be found in the statute book of this state which in words forbids the secretary of internal affairs to receive his own individual application for a land warrant, grant it, cause a survey to be made and returned upon it, accept the return of survey, pass upon the validity of the survey, as a member of the board of property, and finally cause a patent to issue to himself, the individual, for the land included within it. But it does not follow that everything may be done by a public officer that is not forbidden in advance by some act of assembly. Remedies are provided for evils when they are discovered, and rules of law are applied when a necessity arises for their application.

What is alleged in this case, and was held by the learned judge of the court below, is that dealings between a public officer and himself as a private citizen that bring him in collision with other citizens, equally interested with himself in the integrity and impartiality of the officer, are against public policy. In a general way it may be said that public policy means the public good. Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy. Thus, contracts in

restraint of trade or marriage, gambling contracts, usurious contracts, contracts to do immoral acts or to procure them to be done by others, are against public policy. The courts will not enforce notes given on Sunday or for an illegal consideration, because public policy forbids it.

They will not enforce any form of contract which binds the maker to do an act that is contrary to law, or that is hurtful to the public, the state, or the nation, because such contract is against the public good and therefore against public policy. But public policy forbids many things that do not rest on contract. All the statutes and decisions relating to the exercise of the police power; to the incompatibility of certain offices; to the power of municipal authorities to enforce quarantine regulations; and many similar subjects, rest on public policy. It would require no statute to justify a court in holding that a city or county treasurer could not be at the same time the auditor to settle and adjust his own accounts. The temptation it would afford is too great to make it good policy to subject the officer to it, or the public to its possible consequences. Our constitution makes a member of the legislature ineligible to an office that was created by the body of which he was a member. The reason is that if he was eligible he might be affected by the temptation to make a place for himself. Examples of the practical application of the rule, that what is against the public good is against public policy, might be multiplied largely, without rendering the reason of the rule any more apparent than it must be from those already referred to. We proceed therefore to inquire whether the defendant's title is affected by public policy. The office of secretary of internal affairs is a comparatively new one, having been created by the present constitution of the state. Its powers and duties are defined by the act of May 11, 1874. The officer is the elective and responsible head of an independent department of the state government. He is elected by the people of the state, for a term fixed by law. He reports the working of his department directly to the legislature; and within the range of the duties imposed upon him represents the whole people, as truly as the governor does in the performance of his duties as the executive head of the state. Among other duties and responsibilities committed to the secretary of internal affairs are all those formerly resting on the surveyor-general. He has the survey and sale of the public lands, and, in connection

therewith and as incidental thereto, he has the exclusive custody of all books, documents, maps and returns of survey relating to them, to state and county lines, to state and turnpike roads, and to railroads, canals and other public improvements. Applications for the survey of any part of the public lands must be made to him. If granted he issues the warrant to the proper deputy surveyor to make the survey. When the survey is made it must be returned to him for acceptance. The patent or deed of the state issues only on his certificate or direction. Every step in the patentee's title, every particle of evidence relating to each step, down to the delivery of the patent, is to be found in his office, if it is to be found at all; and can only be seen under his direction. All copies for use in the courts must be made and certified by him. In fact he is the custodian of all the public records relating to all the lands in the state; and upon his fidelity titles of vast importance and value depend. It will not be contended that these invaluable public records are placed in his care for his private profit. His fellow-citizens did not elect him to the head of this department of government to enable him to prey upon their titles, or speculate on the age of their surveys, or the want of form in the work of clerks or surveyors through whose hands their applications have passed. On the contrary, his office is a public trust. He holds the books, documents, maps and surveys in his office for the protection of the titles granted under or evidenced by them, and he is bound to absolute integrity and impartiality towards every person interested in them. But he is more than a custodian of these evidences of title. He is, by virtue of his office, a member of the board of property, and sits therein as a judge to hear and determine all questions raised by caveat or petition affecting returns of survey, the location of warrants and warrant lines, the rights of settlers and the titles of patentees. The nature of his duties disqualifies such an officer from dealing with his own department, or sitting in judgment on his own or his adversary's title of the public lands, as clearly as does the office of president judge of the court of common pleas disqualify the individual who holds the office from personally conducting his own litigation, in his own court, before himself. If a judge has the misfortune to be interested in a cause in his own court, the law provides that an impartial judge shall be called in from an adjoining district to try the cause; but the state can have but one

secretary of internal affairs. No provision has been made for the settlement of controversies over titles to the public lands between him and private citizens, the records of whose titles were in his possession and under his control. It seems never to have occurred to our constitution-makers or lawmakers that one holding this important office would voluntarily place himself in a position to render a provision of that sort necessary. It is for this reason that no statute can be found that expressly forbids him to traffic with himself in the public lands. His deputy is his executive hand, and is disqualified by the same considerations that affect the secretary himself. Neither of them has any right to acquire, while occupying the office, an interest in the lands under the care of the department, that shall make the suppression, the destruction, or the mutilation, of a map, a paper, or a word or letter of any document or record in his exclusive custody, a matter of advantage or profit to himself.

We have in the case now under consideration a striking and startling illustration of the practical operation of the doctrine contended for by the appellant. The plaintiff is an extensive manufacturer of sawed lumber in the county of Potter. Among the lands purchased by him for the supply of his mills with timber is a large tract known as warrant No. 4714 in the warrantee names of Isaac Wharton *et al.* This tract purports to be one of a block of surveys made at the same time, of which No. 4724 is a member and is called for as an adjoinder of 4714. The plaintiff and those through whom he derives his title have paid taxes on this tract for nearly a century, and have understood and claimed that it was located adjoining No. 4724, as the calls would indicate. In 1891 the deputy secretary of internal affairs procured a warrant to be issued to himself for nine hundred acres of land alleged to be vacant, situated in the county of Potter and adjoining No. 4724. It was promptly returned by the deputy surveyor for Potter county with a survey covering most if not all of the land claimed by plaintiff under No. 4714. The plaintiff becoming aware of the survey so made appeared before the board of property to protest against the attempt to appropriate his land. This tribunal promptly decided against him, and a patent was as promptly issued to the deputy secretary of internal affairs, with the fullest knowledge on the part of both the secretary and his deputy that the land was claimed under an older warrant. There was nothing left for

the plaintiff but an appeal to the courts. This he had to make with the knowledge that every paper, and every scrap of evidence relating to the issuing, location and return of his warrant, was in the possession and under the control of his adversary. He could have an inspection of these papers and documents only by permission of the officer who, as an individual, was interested in defeating his title. He must apply to the same officer for the copies needed for the trial of his cause. The antagonism between the duties of the officer and the pecuniary profit of the man who held the office is plain and direct. It was brought about by the voluntary act of the officer, having at the time the fullest knowledge of the situation and of the necessary consequences of his conduct. In such a contest the officer has an advantage never contemplated or provided for by the lawmakers. He is exposed to a temptation from which he should have fled. The department under his practical control is subjected to criticism and suspicions that have a tendency to create public distrust of the integrity of its administration, and of the security of titles depending on the records under its care. But the contagion of the example set by the deputy secretary is noticeable. When the trial was reached in the court below, it turned out that the deputy surveyor who located the warrant of 1891, and who had the rightful custody of the records of that office, was put in an unfortunate position for his disinterestedness as a witness by the fact that his wife had become a part owner of the land under a grant from the deputy secretary. An experienced surveyor from an adjoining county, whose familiarity with the original lines in that region made his testimony of great importance in reaching a conclusion as to the proper location of 4714, had been placed in the same predicament, by the same expedient. His wife was also a part owner, deriving her title from the deputy secretary. Surely the owner of No. 4714 was in *gremio legis*. This remarkable combination may have been accidental. We presume it was innocent. Nevertheless to litigants whose property is at stake, and to spectators, measuring the acts of men by the common business standards, it suggests possible dangers and temptations on which we will not enlarge. Such dealings by an officer are to be regretted because of their necessary consequences; and a proper consideration for the public security, and for the confidence of citizens in the officers of the state, forbid them. Whether we consider the interests of the citi-

zens for whose security and protection the state exists, or the preservation of public confidence in the purity of the administration of public affairs, or the honor and character of the officer as a public servant, the conclusion reached is the same. Public policy cannot tolerate such dealings by an officer with his own department or office. It will not uphold them.

It follows that the warrant issued to the deputy secretary of internal affairs confers no title, as against a claimant under an older survey, to the land in controversy. The warrant was issued contrary to public policy. The board of property should have refused to accept the return of survey under it and to permit a patent to issue for it. The learned judge of the court below rightly rejected it when offered on the trial, for the purpose of showing title in the appellants, and the judgment is now affirmed.

OFFICERS DEALING WITH THEMSELVES AS PRIVATE CITIZENS.—An officer cannot detain money received by him in his official capacity to satisfy a debt due him in his private capacity: *Prewett v. Marsh*, 1 Stew. & P. 17; 21 Am. Dec. 645. It is against public policy to allow a public officer to place himself in an antagonistic position towards those for whom he occupies a fiduciary position, and by so doing obtain a contract for himself from a board of which he is a member: *Pickett v. School District*, 25 Wis. 551; 3 Am. Rep. 105.

BROWN v. STACKHOUSE.

[155 PENNSYLVANIA STATE, 532.]

LANDLORD AND TENANT—DISTRESS FOR RENT.—GOODS OF A STRANGER CON-SIGNED TO AN AGENT to be sold on commission are not liable to distress for rent due by the agent.

LANDLORD IS LIABLE AS A TRESPASSER AB INITIO if he causes a warrant of distress to be levied on goods in possession of his tenant which he knows do not belong to the latter but have been left with him to sell upon commission.

TRESPASS for wrongful distress. Judgment for plaintiff.

Charles I. Landis and H. C. Brubaker, for the appellant.

W. U. Hensel and J. Hay Brown, for the appellee.

GREEN, J. The question whether Stackhouse, the landlord, knew, before the distress and sale, that the organs distrained were the property of the plaintiffs, was fairly submitted to the jury as essential to the right of recovery, and when the verdict

was found for the plaintiff, the fact of such prior knowledge was conclusively established. There was ample testimony to support the allegation, and although the defendants denied having such knowledge a question of veracity only was raised by such denial, and that was a matter exclusively for the jury. The ultimate question which then arises is whether the distress was lawful or not. If not, the defendants were trespassers, and were liable as such. In *Kerr v. Sharp*, 14 Serg. & R. 399, we held that, "any irregularity in taking a distress makes the landlord, at common law, a trespasser *ab initio*," and we decided that an omission to appraise and advertise the sale of the goods distrained agreeably to the act of March 21, 1872, was such an irregularity, and that trespass was the proper remedy. To the same effect is *Brisben v. Wilson*, 60 Pa. St. 452, in which we said, "as no legal right or title can grow out of a trespass, the sale is invalid, and trover can be maintained against the purchaser of the goods."

In *Caldcleugh v. Hollingsworth*, 8 Watts & S. 302, cited for the appellant, no notice was given to the landlord, before selling, that the machine distrained was the property of another and left with the tenant for repairs, and that element, which is the controlling one in this case, was absent from that.

That the goods of strangers consigned to an agent to be sold on commission are not liable to distress for rent due by the agent is such very familiar law that it is conceded by the appellant, and the merest reference to one or two of the cases on that subject will suffice the purpose of the present contention: *Howe Sewing Machine Co. v. Sloan*, 87 Pa. St. 438; 30 Am. Rep. 376; *Page v. Middleton*, 118 Pa. St. 546.

In this case the plaintiff caused the warrant of distress to be levied upon the plaintiff's goods, knowing them to be the property of the plaintiff, left with the tenant, Manby, for sale on commission, according to the verdict of the jury, and his distress was therefore unlawful and constituted him a trespasser *ab initio*. That being the case trespass was an available remedy to the owner as upon any unlawful taking. In the case of *Esterly Machine Co. v. Spencer*, 147 Pa. St. 466, the landlord had no knowledge of the title of the owner when the distress was levied, and as soon as he was notified of the owner's title he requested the owner to replevy the goods, and adjourned the sale to give him time to do so, but the owner did not replevy them and waited till after the sale, and then brought trespass. He had distinct actual notice of the distress

before the sale, and had the opportunity to pursue the statutory remedy of replevin within the statutory time of five days, but he declined to do so, and permitted the sale to proceed. We held he was bound to bring replevin. But here the distress was levied in Lancaster City, Pennsylvania, and the owners lived in Boston, Massachusetts, and had no notice of the distress, and consequently no opportunity to replevy the goods within the five days.

In view of all the facts of the present case we think there was no error in the action of the learned court below.

Judgment affirmed.

LANDLORD AND TENANT—DISTRESS FOR RENT—WHAT NOT SUBJECT TO—Goods held by an agent for sale on commission are not liable to distress for rent due from the agent: *Howe Sewing Machine Co. v. Sloan*, 87 Pa. St. 438; 30 Am. Rep. 376; *McCreery v. Claffin*, 37 Md. 435; 11 Am. Rep. 542. See the extended note to *Lichtenthaler v. Thompson*, 15 Am. Dec. 585.

McKENNA v. LYLE.

[155 PENNSYLVANIA STATE, 509.]

ARBITRATION.—THE REVOCATION OF A SUBMISSION TO ARBITRATION IS NOT ITSELF REVOKED by the parties making it subsequently doing some act required by the agreement of submission. The revocation cannot be annulled except by a fresh agreement of submission, or a plain and direct notice of the withdrawal of the revocation.

ARBITRATION, REVOCATION OF SUBMISSION.—A party may revoke a submission at any time before an award is made. This rule applies only to cases of bare submission, and there is a line of cases holding that, where a submission is part of an agreement containing other terms to be performed by the parties, and especially if those terms have been executed in whole or in part, the submission is not revocable.

ARBITRATION, WAIVER OF RIGHT TO.—If, after the submission to arbitration, one of the parties undertakes to revoke it, his adversary loses his right to insist upon the arbitration, though the revocation may be inoperative, if he proceeds without objection to a trial of the cause in the court, and has it submitted to a master for trial on the merits.

Aaron Thompson, for the appellant.

Henry B. Freeman, for the appellee.

GREEN, J. This proceeding was a bill in equity for the dissolution of a partnership subsisting between the plaintiff and defendant, and for a settlement of the accounts of the firm. The bill was filed on February 15, 1890. On the 11th of March, 1890, the parties, by an agreement in writing, re-

ferred all matters in dispute to two arbitrators with a provision that their award should be final, neither party to file exceptions or to appeal from the same. It was also agreed that the partnership should be dissolved as of May 1, 1890, that the accounts and books should be open to the arbitrators and to both parties, and that each partner should have power to collect all unpaid debts due the firm, to be paid a commission of four per cent on the amounts collected, and that the moneys collected should be deposited in a bank named, to the credit of the counsel for the firm, and to be paid out on orders of the firm or of the arbitrators. The ultimate balance was to be paid, one-third to McKenna, and two-thirds to Lyle. A cross-bill was filed, and it was agreed that both bills should be withdrawn upon payment of costs. The arbitrators proceeded to perform their duties as such, and held a number of meetings, examined the books and accounts, and on May 6, 1890, agreed upon and signed a written award finding that there was due to Lyle four thousand one hundred and forty-three dollars and seventeen cents, and that there was due by McKenna to the firm nine hundred and fourteen dollars and eight cents. Before this award was made or signed, to wit: on April 25, 1890, McKenna addressed a letter to the arbitrators, of which the following is a copy:

PHILADELPHIA, April 25, '90.

To Messrs. Castle and Griffin,

GENTLEMEN: As you have up to this present time given me no hearing with my witnesses, although so requested by me for such hearing, I give you each notice that I hereby revoke the appointment of yourselves as arbitrators in the disputed matters of the partnership of *Lyle v. McKenna*.

Respectfully,

FRANCIS MCKENNA.

It is not questioned that this notice was duly served on the arbitrators at once and before the award was either made or signed.

Upon examining the docket entries a rather singular state of things appears. In point of fact neither the bill nor the cross-bill was withdrawn. On December 10, 1890, the award was filed, and on December 18, 1890, exceptions by the plaintiff were filed. On March 18, 1891, the death of Lyle was suggested and a *scire facias* was issued to bring in his executrix. Then on April 14, 1891, a rule to plead, answer, or demur was entered to which, on May 14, 1891, the executrix

filed a plea and answer. June 6, 1891, replication filed, and on June 10, 1891, the court appointed an examiner. Then on January 21, 1892, a rule was entered to strike off the award of the arbitrators which had been filed December 10, 1890, thirteen months before, and on January 30, 1892, this rule was made absolute. On March 5, 1892, the examiner was appointed master, and he filed his report on April 25, 1892, with the exceptions thereto made before him.

It thus appears that notwithstanding the agreement to withdraw the bill and cross-bill they were never withdrawn, but the parties proceeded in the cause before the examiner, and afterwards before the master, who made a final report. In his report he recites that under his appointment the parties attended before him with their proofs and witnesses, that a large amount of testimony was taken embracing nearly two hundred pages and occupying much time, but instead of deciding the case upon its merits, the master reports that the parties had made the agreement of submission before referred to, and that they were bound by it without any right to file exceptions or to appeal. He does not report any decree, but in a supplemental report filed after the exceptions were submitted to him he recommends that the bill be dismissed. The master's report was confirmed by the learned court below, and the bill was dismissed, and from that decree this appeal was taken.

It will be observed that the proceedings are incongruous. The award of the arbitrators was first filed long after it was made, and more than a year afterwards it was stricken off. Then the master was appointed, and the parties proceeded to try the case on its merits before him just as though there had never been an award, and apparently without any objection on either side. No attempt to enforce the award was made either by an action on it or by seeking a decree in the case in accordance with its terms. The master founded his report exclusively upon the award, and no other question is discussed or decided by him except the binding efficacy of the award.

We are unable to agree with him upon that subject. He bases his finding upon the proposition that the agreement of submission had been fully executed, and that therefore the notice of revocation was given too late. The only fact upon which he founds his conclusion is stated by himself as follows: "It appears from the evidence that on the very day of the filing of the report of the arbitrators, May 6, 1890, there

was deposited in the Philadelphia Trust Company, which was agreed upon as the depository of the funds of Lyle and McKenna, pending the settlement of their differences, the amount of \$669.60, showing that as far as Mr. McKenna was concerned he must have recognized the articles of arbitration as having an existence upon May 6, 1890, because the deposit was made by him."

With entire respect to the learned master we think this was a *non sequitur*. The money being in the hands of McKenna should be deposited somewhere, and no reason is given why it should not be deposited with the Philadelphia Trust Company as well as with any other institution. But even if he had deposited it there because it was provided in the agreement of submission that the money should be deposited there, that is no reason why McKenna should thereby be adjudged to have abandoned his revocation of the submission. These two subjects have no necessary connection. He had just given the formal notice of revocation eleven days before, and it is inconceivable that he intended to abandon that notice and give his consent to a resumption of jurisdiction by the arbitrators, by such an entirely inconsequential act as a deposit of some of the firm money collected by him in the bank in which the partners had agreed the firm moneys should be deposited. In other words, there is no inconsistency in the fact of such a deposit with the continuance of the revocation. If the revocation were operative, its effect had already been accomplished, the submission had come to an end, and the authority of the arbitrators had ceased. It could not be restored except by a fresh agreement of submission or a plain and direct notice of the withdrawal of the revocation. But nothing of that kind occurred. On the contrary the case was proceeded with by the parties in regular course to a trial on the merits just as though there never had been any submission. These subsequent proceedings are vastly more persuasive that the defendant consented to a waiver of all claim under the award than is the fact of the deposit in bank that the plaintiff had abandoned his revocation.

The master in his report cites the case of *McCahan v. Reamey*, 33 Pa. St. 535, as authority for his conclusion that the revocation was nugatory, because the party revoking, subsequently acted under the submission. An examination of that case, however, shows that there was no question of revocation in it. There was no revocation in the case by either

party. The question presented was simply whether a party to a submission without any right to file exceptions or appeal, might nevertheless file exceptions and appeal, and it was held he could not. In the supplemental report the master refers also to the case of *Shisler v. Keavy*, 75 Pa. St. 79, from which he quotes as follows: "A submission in writing cannot be revoked except by writing given to the referees or a majority of them." But that was precisely the kind of revocation which was given in this case, and hence the case is not in point. It is true the master says in his supplemental report that McKenna, after his notice of revocation, "received moneys, deposited moneys, rent was paid and other business transacted," but as these were all acts which it was his right and duty to do and perform in his capacity as a partner, no inference of his abandonment of his revocation flows from any of them.

The authorities as to the right of a party to revoke a submission at any time before the award is made are so familiar that no discussion of the question is needed. But, under the modern decisions, that rule applies only to cases of bare submission, and there is a line of cases, in which it is held, that where a submission is part of an agreement containing other terms to be performed by the parties, and especially if those terms have been executed in whole or in part, the submission is not revocable. Illustrations of this will be found in the cases of *Lewis' App.*, 91 Pa. St. 359, *Williams v. Tracey*, 95 Pa. St. 308; *White's App.*, 108 Pa. St. 473; *Mitchell v. Newman*, 4 Penny. 443.

In the present submission there was an agreement that the partnership should be dissolved on May 1, 1890, also that each partner should be entitled to a commission of four per cent on all collections of debts due to the firm, also that the moneys so collected should be deposited in a particular bank to the credit of the counsel of the firm who were named, and should be paid out on the orders of the firm, or, in case of refusal, upon the orders of the arbitrators. All suits brought by or against the firm were to be conducted by the same attorneys, and the costs and expenses of the reference were to be paid equally out of the collected funds of the firm. All of these things are outside the partnership, and would not be practicable except under the agreement of submission. If there were nothing else in the case affecting the question

under consideration we would probably be obliged to hold that the submission was irrevocable.

But the conduct of the parties, as hereinbefore stated, has rendered that question of no significance. When the award was stricken off the record on January 21, 1892, no appeal having been taken, and no further attempt having been made to secure its enforcement, it ceased to have any efficacy. Also when the parties proceeded with the case by having an examiner appointed and taking testimony on both sides during several months, after the regular pleadings had produced an issue to be tried, and, after all that, had a master appointed and proceeded before him to final hearing on the merits, they undoubtedly waived all rights under the submission and award. The plaintiff of course did not recognize the submission or the award, or do or propose to do anything under its terms. The defendant made no further efforts to have it enforced and united in the trial of all the merits of the case under the bill and answer. It is impossible to regard this action of the parties as anything else than a waiver of the submission and award. That being so, it was the duty of the master to decide the merits of the case and report his findings to the court below with the recommendation of such a decree as he thought proper. This he has not done, and the decree must be reversed and the record be sent back with directions to the court below to recommit the case to the master for further proceedings.

The decree of the court below is reversed at the cost of the appellee, and the record is remitted to the court below with instructions to recommit the case to the master for further proceedings in accordance with this opinion.

ARBITRATION—REVOCATION OF SUBMISSION—WHEN MAY BE MADE.—A submission to arbitration may be revoked at any time before the closing of the proofs and the final submission of the cause for decision: *People v. Nash*, 111 N. Y. 310; 7 Am. St. Rep. 747, and note; *Bank v. Widner*, 11 Paige, 529; 43 Am. Dec. 768, and note.

ARBITRATION—WAIVER OF RIGHT TO.—An agreement to arbitrate is impliedly revoked by bringing suit to enforce a mechanic's lien for the claim in reference to which the agreement was made: *Paulsen v. Manabe*, 126 Ill. 72; 9 Am. St. Rep. 532. See *Savage v. Phoenix Ins. Co.*, 12 Mont. 458; 23 Am. St. Rep. 591, and note.

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ACCOUNTING.

1. **ACCOUNTING BY FIDUCIARY.—**COURTS OF EQUITY HAVE JURISDICTION to compel an accounting when fiduciary relations exist or fraud is charged, although the complainant has an adequate remedy at law. *Warren v. Holbrook*, 554.

2. **ACCOUNTING BY FIDUCIARY—JURISDICTION—ELECTION OF REMEDIES.—**An agent or employee whose duty it is to keep a true and accurate account of all moneys received, and to account therefor to his employer, occupies a fiduciary position. If he retains all or a portion of such funds he commits a breach of trust, the extent of which is peculiarly within his knowledge. In such a case the employer has a choice of remedies, and may maintain an action at law by attachment or garnishment, or may proceed in equity for an accounting and pursue the fund, and the fact that the acts complained of impute to the defendant a criminal offense and that, if he were compelled to render an account, evidence might be produced forming the basis of a criminal accusation, do not oust the court of jurisdiction. *Warren v. Holbrook*, 554.

3. **BREACH OF TRUST—EVIDENCE.—**When in a civil action for an accounting by a fiduciary agent for moneys which it is alleged he has received and for which he has failed to account, a large amount of money is found in his possession including a small sum which is all that it is proved he has taken, and it is within his power to show where the remainder of the money was obtained if it was not taken from his principal, his failure to testify or to make such showing in his own behalf must be construed most strongly against him. *Warren v. Holbrook*, 554.

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ACTIONS.

1. AGREEMENT FOR CONTINUANCE IS EQUIVALENT TO GENERAL APPEARANCE IN ACTION. The question of want of jurisdiction by reason of improper service of process cannot afterwards be raised. *Baisley v. Baisley*, 728.
 2. WAIVER OF PROCESS.—If a proceeding against an officer for not returning an execution is commenced by motion and the service of process by answering and going to trial, he submits himself to the jurisdiction of the court and cannot object that the proceeding was by motion and notice instead of by action and service of process. *Hawkins v. Taylor*, 82.
- See CORPORATIONS, 18, 19, 30; COTENANCY, 6; COURTS, 2; ESTOPPEL, 2; EXECUTION, 2; JURISDICTION, 1; NEGOTIABLE INSTRUMENTS, 6; PARTITION, 1; PROCESS, 3; RAILROADS, 14.

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ADVERSE POSSESSION.

1. Possession must be actual, continuous, visible, and notorious, as well as hostile, to the title of the owner in order to be adverse. *Smeberg v. Cunningham*, 613.
2. WHAT DOES NOT CONSTITUTE.—One who is in the possession of land, but who did not enter under any claim or color of right, nor in the belief that he had any right, does not hold it by adverse possession. *Smeberg v. Cunningham*, 613.
3. WHAT DOES NOT CONSTITUTE.—An entry on land with intent to remain in possession until the real owner claims it or demands rent is not hostile nor adverse. *Smeberg v. Cunningham*, 613.
4. STATUTE OF LIMITATIONS BEGINS TO RUN in favor of the party in possession only from some act of possession so open, notorious, and hostile that it constitutes in law notice to the real owner. *Smeberg v. Cunningham*, 613.
5. There is every presumption that occupancy is in subordination to the true title, and if a possession is claimed to be adverse, the act of the wrongdoer must be strictly construed, and the character of his possession clearly shown. His intention to claim adversely is an essential ingredient of the disseisin. *Preble v. Maine etc. R. R. Co.*, 366.
6. INTERRUPTION.—Any substantial interruption of an adverse possession before the lapse of the period required to constitute the statutory bar restores the seisin of the rightful owners of the land, and in order to

give rise to the statutory bar thereafter a new entry and disseisin is necessary. The running of the statute may be interrupted if the possession ceases to be adverse, although possession in fact continues. *Stewart v. Stewart*, 67.

7. **ADVERSE POSSESSION BY MISTAKE.**—One who by mistake occupies for twenty years or more land not covered by his deed, with no intention to claim title beyond his actual boundary, wherever that may be, does not thereby acquire title by adverse possession to the land beyond the true line. *Preble v. Maine etc. R. R. Co.*, 366.

8. **ADVERSE POSSESSION BY NONRESIDENT**, maintained by his tenant, will, if sufficiently long continued, create title by prescription. *Lindenmayer v. Gunat*, 685.

See COTENANCY, 3; JUDGMENTS, 5, 6.

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1. **NOTICE TO AGENT WHEN NOTICE TO PRINCIPAL.**—The rule that notice acquired by an agent while transacting the business of his principal is notice to the latter applies as well to banking and other corporations as to individuals, but when the agent acts for himself and not for his principal the rule does not apply. *Merchants' Nat. Bank v. Lovitt*, 770.

2. **POWER OF ATTORNEY—CONSTRUCTION.**—Powers of attorney to sell and convey land are strictly construed. *Penfold v. Warner*, 591.

3. **POWER OF ATTORNEY—CONSTRUCTION.**—A power of attorney to sell and convey any and all lands belonging to the parties in a certain county applies only to land then owned by the parties. *Penfold v. Warner*, 591.

4. **POWER OF ATTORNEY—LIMITATION ON.**—A power of attorney given by parents to their son, authorizing him to sell and convey all land belonging to them, or either of them, in a certain county, applies only to the land then owned by them, and does not confer authority upon the son to sell land conveyed by his father to his mother after the execution of such power, although at the time of its execution she had an inchoate right of dower in the land so conveyed. *Penfold v. Warner*, 591.

See ACCOUNTING; CORPORATIONS, 6; HUSBAND AND WIFE, 2, 3; INSURANCE, 16; LANDLORD AND TENANT; NEGOTIABLE INSTRUMENTS, 1, 11.

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ALTERATION OF INSTRUMENTS.

1. **AN ALTERATION WILL NOT AVOID AN INSTRUMENT**, though material and made without the knowledge or consent of one of the parties, if it is merely the correction of a mistake, to conform the writing to the intention of all the parties, and is made in a manner clearly negating the idea of any fraud or of a design to obtain an advantage thereby. *Foot v. Hambrick*, 631.

2. **ALTERATION OF CONVEYANCE OF HOMESTEAD—CORRECTION OF MISTAKE, HOW FAR AVOIDS.**—Where a husband and wife execute a mortgage,
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which, owing to a mistake in the drafting, does not, as was intended, cover their homestead, and the husband afterwards, without the knowledge or consent of his wife, but with no fraudulent design, alters the description, merely for the purpose of conforming it to the intention of the parties, the altered instrument will stand good as to all the lands included in the corrected description except the homestead. As to that, the deed, under such circumstances, is not the act of the wife. *Festo v. Hambrick*, 631.

See HUSBAND AND WIFE, 2, 2.

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See EJECTMENT, 1; JUDGMENTS, 11; PROCESS, 1.

ANIMALS.

1. **DOGS, LIABILITY OF OWNER OF.**—If one lawfully on the premises of another is there bitten by a vicious and dangerous dog, kept by the occupier of the premises with knowledge of its nature and character, he is answerable for the injuries so sustained, although he had a notice posted in the lane leading to his house containing the warning "Beware of the Dogs." *Sylvester v. Maag*, 878.
2. **DOGS—TRESPASS BY—DAMAGES FOR KILLING—JUSTIFICATION.**—The fact that a dog is committing a trespass when killed, and is, in the opinion of the person doing the killing, about to destroy some of his property, will not constitute a justification for the killing, nor in any way mitigate actual damages which the owner of the dog is entitled to recover. *Ten Hopen v. Walker*, 598.
3. **DOGS—EXEMPLARY DAMAGES FOR MALICIOUS KILLING.**—When a dog is killed intentionally and from willful and malicious motives its owner may recover exemplary damages, although the dog was committing a trespass when killed. Such damages are not awarded as a punishment to the wrongdoer, but to compensate the injured party. *Ten Hopen v. Walker*, 598.
4. **DOGS—VALUABLE PROPERTY IN.**—Dogs have value, and are the property of the owner as much as any other animal which one may have or keep. *Ten Hopen v. Walker*, 598.

APPEAL.

1. **THE FAILURE TO SERVE A NOTICE OF APPEAL ON ONE OF THE PARTIES** is not jurisdictional to the extent of depriving the court of the power to consider and determine such questions in the case as may be decided without affecting his rights. *Soukup v. Union Investment Co.*, 317.
2. **AN APPEAL FROM A JUDGMENT** cannot be taken until it is entered. *Durant v. Comegys*, 267.
3. **CONTINUANCE OF CRIMINAL CASE—DISCRETION OF COURT—EVIDENCE.** A denial by a trial court of an application for a continuance for the term in a criminal case will not be disturbed on appeal unless an abuse of discretion is clearly shown, and on the showing for a continuance no error is committed by admitting evidence of facts constituting a counter-showing, and consisting of acts and declarations by the accused inconsistent with the good faith of his showing, or in admitting the declarations of others not separately objected to as hearsay. *Lascelles v. State*, 216.

4. **EVIDENCE.**—It is largely within the discretion of the court to determine how far it will go in the trial of collateral issues. Hence an appellate court will not review the discretion of a trial court in excluding evidence tending to show that a building consumed by fire communicated by a naphtha torch in use for burning off old paint had caught fire at some previous day from the use of the same torch. *First Congregational Church v. Holyoke etc. Ins. Co.* 508.
 5. **IRRELEVANT EVIDENCE ADMITTED IN AN EQUITY CASE** will be disregarded by the supreme court on appeal. *Kleimann v. Gieslmann*, 761.
- See **EXECUTION**, 3, 5; **JURISDICTION**, 2; **JUSTICES OF THE PEACE**; **NEW TRIAL**; **RAILROADS**, 7, 27.

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ARBITRATION.

1. **ADMISSION OF EVIDENCE AFTER CLOSE OF CASE.**—When the prevailing party in an arbitration proceeding, after announcing his case as closed and after the arbitrators have stated that no further testimony will be heard, produces evidence which is received to settle in his favor a conflict in the evidence without notice to or any opportunity afforded the losing party to hear or reply to such evidence, this is a sufficient ground for setting aside the award, without any charge of fraud, or evidence by the unsuccessful party that he is injured thereby. *Jackson v. Roane*, 238.
2. **AVOIDANCE OF AWARD FOR MISCONDUCT.**—When a party attacking an award shows that the arbitrators, without notice to him, and after having announced that they would hear no further evidence, then proceeded to receive evidence in behalf of the successful and opposing party, there is no presumption that the attacking party consented thereto, nor is the burden of proof on him to show an absence of notice of the taking of such evidence. *Jackson v. Roane*, 238.
3. **ATTACK UPON.**—When an award is attacked for misconduct on the part of the arbitrators and the successful party, the jury have no right to consider the legal ability, business skill, or systematic habits of the arbitrators in reaching a conclusion as to an issue of fact upon which the award may have been based. *Jackson v. Roane*, 238.
4. **CONSULTING THIRD PERSONS.**—Appraisers appointed to ascertain the loss resulting to insured property from a fire may consult a third person about any matter in controversy and may, if they see fit, act upon the opinion of that person in forming their own judgment and in making the award. All that is necessary is that they should form a

judgment of their own, and not adopt nor absolutely follow the opinion of the person consulted in contravention of any opinion of their own. *Bangor Sav. Bank v. Niagara etc. Ins. Co.*, 341.

5. **THE REVOCATION OF A SUBMISSION TO ARBITRATION IS NOT ITSELF REVOKED** by the parties making it subsequently doing some act required by the agreement of submission. The revocation cannot be annulled except by a fresh agreement of submission, or a plain and direct notice of the withdrawal of the revocation. *McKenna v. Lyle*, 910.
6. **WAIVER OF RIGHT TO.**—If, after the submission to arbitration, one of the parties undertakes to revoke it, his adversary loses his right to insist upon the arbitration, though the revocation may be inoperative, if he proceeds without objection to a trial of the cause in the court, and has it submitted to a master for trial on the merits. *McKenna v. Lyle*, 910.
7. **REVOCATION OF SUBMISSION.**—A party may revoke a submission at any time before an award is made. This rule applies only to cases of bare submission, and there is a line of cases holding that, where a submission is part of an agreement containing other terms to be performed by the parties, and especially if those terms have been executed in whole or in part, the submission is not revocable. *McKenna v. Lyle*, 910.

ARREST.

1. **ARREST WITHOUT WARRANT—RIGHT OF OFFICER TO MAKE—ADULTERY.**
A prosecution for adultery can only be instituted in Michigan by the husband or wife of one of the parties to the crime and whatever suspicions an officer may have he has no right to arrest one for such crime without a warrant. *Filer v. Smith* 603.
2. **ARREST WITHOUT WARRANT.**—For a statutory misdemeanor not amounting to a breach of the peace, such as having possession of short lobsters with intent to sell them, there is no authority in an officer to arrest without a warrant, unless it is given by statute. *Commonwealth v. Wright*, 475.
3. **ARREST WITHOUT WARRANT—WHAT WILL JUSTIFY OFFICER IN MAKING.**
An officer is justified in arresting one formally charged with crime, though it turns out that the person charged is innocent. If he makes an arrest for felony without a warrant although he has no personal knowledge, but acts upon information received from one whom he has reason to rely upon, and although it may turn out that the person charged is not guilty or no felony in fact has been committed, yet he is justified. *Filer v. Smith*, 603.
4. **ARREST WITHOUT WARRANT—LIABILITY—JUSTIFICATION.**—When an arrest is made on suspicion of felony without a warrant and it turns out that the wrong party is thus imprisoned, the party making the arrest must be prepared to show, in justification, that a felony has been committed and that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the party arrested committed it, or was implicated in it. *Filer v. Smith*. 603.
5. **AN OFFICER IS A TRESPASSER IF HE ATTEMPTS TO MAKE AN ARREST WITHOUT A WARRANT** where he is not authorized to do so. If persons resisting such arrest are accused of committing assault and battery in so doing, they should be acquitted, unless they used excessive force in defending themselves or their property. *Commonwealth v. Wright*, 475.

6. **MISTAKE IN MAKING.**—An officer who, through an honest mistake, and after such an investigation into the facts and circumstances as the particular case enables him to make, upon a charge of felony, arrests a party, having reasonable grounds to suppose him to be guilty and the one named in the warrant is not liable to the arrested though innocent party. *Filer v. Smith*, 603.
7. **MISTAKE IN MAKING—OFFICER WHEN JUSTIFIED.**—An officer making an arrest upon warrant, or upon knowledge that a warrant is out, of one whose person is unknown to him, who can, under the circumstances, only act upon a photograph, or description, or both, will be excused, if he acts prudently and honestly, after making such inquiry and examination as the circumstances of the case afford. In such case, the facts being undisputed, the question of probable cause is for the court. *Filer v. Smith*, 603.
8. **MISTAKE IN MAKING—JUSTIFICATION OF OFFICER.**—Whether an officer is justified in making an arrest without a warrant, but upon information that one is out for a party charged with crime whose photograph the officer has and between which and the party arrested he discovers a resemblance, must depend upon whether or not the resemblance is so striking as to be convincing to a man of ordinary prudence and good judgment, and this question should be submitted to the jury for its determination. *Filer v. Smith*, 603.
9. **MISTAKE IN MAKING—LIABILITY OF OFFICER FOR NEGLIGENCE.**—An officer is bound to use all reasonable means to avoid possible mistake resulting in the arrest of an innocent person. He is not justified in relying upon a personal resemblance, as indicated by a comparison with a photograph when there is, within easy reach, means of identification, nor is he justified in relying upon circumstances deemed by him suspicious when the means are at hand of either verifying or dissipating such suspicions without risk, and if, when so negligent, he makes the arrest he is liable for false imprisonment. *Filer v. Smith*, 603.

See FALSE IMPRISONMENT; STATUTES, 1; TRESPASS, 1.

ASSAULT.

1. **SCHOOL-FELLOWS—LIABILITY FOR "RUSHING."**—When a student is passing quietly along the street on his way from school, and his fellow-students form in line behind him and "rush" him, each pushing the one in advance until he is reached, in which performance or play he does not participate, the one immediately behind him and who pushes him is guilty of an assault, and liable in damages for the injuries inflicted. *Markley v. Whitman*, 558.
2. **RUSHING BY FELLOW-STUDENTS—DANGEROUS GAME.**—The game of "rush" as played by fellow-students, the practice of which is to find some one in advance, when the others form in line, each in the rear pushing the one in advance until the one to be "rushed," who knows nothing of what is coming, is pushed by the one immediately in his rear, is dangerous, and constitutes an assault by the latter for which he is liable in damages. The student "rushed" has the same right of protection from such an assault as if he were a stranger. *Markley v. Whitman*, 558.

See ARREST, 5; EVIDENCE, 2, 3.

ASSESSMENTS.

See TAXES, 1, 2.

ASSIGNMENT.

1. **JUDGMENTS—ASSIGNMENT OF—RIGHTS OF ASSIGNEE.**—An assignee of a judgment is not affected by the latent equities of third persons not parties to the judgment of which he had no notice at the time of the assignment. *Western Nat. Bank v. Maverick Nat. Bank*, 210.
2. **JUDGMENTS—ASSIGNEE'S RIGHTS AS AGAINST EQUITIES OF THIRD PARTIES.** When a mortgage is given to secure several notes, some of which are negotiated by the mortgagee before maturity and others retained by him, and after the maturity of all the notes he forecloses the mortgage in his own name for the whole amount of the notes so transferred and retained, and then assigns the judgment in foreclosure to his creditor who extinguishes his assignee's antecedent debt, and in addition thereto pays him a large sum in cash as the consideration for such assignment, without notice of the transfer of the notes or that the transferee thereof has any interest in the mortgage or in the foreclosure judgment, such assignee holds the judgment free from, and unaffected by, the equities of such transferee. *Western Nat. Bank v. Maverick Nat. Bank*, 210.
See CORPORATIONS, 27; CREDITOR'S SUIT; TAXES, 3; TRUSTS, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. **CONSTRUCTION OF INSOLVENCY LAW.**—The Maryland system of involuntary insolvency is intended to secure to the creditors of those who are insolvent, or in contemplation of insolvency, the right to select a permanent trustee to settle and wind up the insolvent estate, and when an insolvent, by any act of his, seeks to frustrate the design of the law, after he has committed an act of insolvency condemned thereby by executing an assignment for the benefit of creditors to a trustee of his own choosing, even though it is made without preference, and conveys all his property, any creditor or creditors holding claims against the insolvent debtor of the amount required by statute can, within four months after the commission of such act of insolvency, file a petition to have the insolvent debtor adjudicated an insolvent under the involuntary provisions of the law, also that the appointment of such trustee by the insolvent be set aside and that a permanent trustee be appointed. *Riley v. Carter*, 443.
2. **ASSIGNMENT FOR BENEFIT OF CREDITORS MADE BY LUNATIC** is not void, but voidable merely. *Riley v. Carter* 443.
3. **ASSIGNMENT FOR BENEFIT OF CREDITORS BY LUNATIC—RIGHT OF CREDITORS TO SET ASIDE.**—Creditors, unless prevented by statute, are entitled to have an assignment for the benefit of creditors set aside, on the ground that it invades their rights and was executed by their debtor while he was insane. *Riley v. Carter*, 443.
4. **ASSIGNMENT FOR BENEFIT OF CREDITORS EXECUTED IN DUPLICATE—EFFECT OF.**—When two deeds of assignment for the benefit of creditors are executed in duplicate and are in all essential respects exactly the same they will be construed together as forming parts of a single conveyance and will convey to the trustees therein named the same interests and estate which they would have taken under one deed. *Riley v. Carter*, 443.
5. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS COMPLETE AND REGULAR ON ITS FACE** cannot be attacked in a collateral proceeding. *Hamilton-Brown Shoe Co. v. Mercer*, 381.

6. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**—An attachment of property which has been conveyed to an assignee for the benefit of creditors cannot be sustained on the ground that persons are falsely designated in the schedule as having claims against the insolvent when the statute provides that "no assignment shall be declared false or void for want of any list or inventory." *Hamilton-Brown Shoe Co. v. Mercer*, 331.
7. **ASSIGNMENT FOR BENEFIT OF CREDITORS BY SURVIVING PARTNER—EFFECT OF ON INDIVIDUAL AND FIRM PROPERTY.**—A deed of assignment for the benefit of creditors made by a surviving partner to trustees of all his individual property and estate, and of all the property and estate belonging to the partnership, will convey to such trustees all of the surviving partners' individual estate and property, and all the property, assets, and estate of his firm, together with all real estate held in the firm name, including all which stands in the names of the individual partners, or either of them, which has been purchased with partnership funds, and equity will regard such real estate for the purposes of the partnership and between the partners and their creditors as personal estate for the payment of partnership debts and the adjustment and winding up of the partnership concerns, subject, however, in all respects, to the operation and effect of the provisions of the insolvent laws of the state. *Riley v. Carter*, 443.
8. **ASSIGNMENT FOR BENEFIT OF CREDITORS BY SURVIVING PARTNER** of all partnership and individual property is to be considered as an assignment of partnership property for the benefit of partnership creditors, and of separate property for the benefit of separate creditors, and is valid. *Riley v. Carter*, 443.
9. **RIGHT OF SURVIVING PARTNER TO MAKE.**—A surviving partner may lawfully make an assignment of the partnership property for the benefit of the firm's creditors, provided such assignment is just and equitable, made for the benefit of all of the creditors, and does not violate any of the provisions of the insolvency law of the state. *Riley v. Carter*, 443.
10. **WHEN FRAUDULENT.**—When the effect of a conveyance is upon its face to hinder and delay creditors, it will be construed as void against such creditors, without stopping to inquire what may have been the actual intention of the grantor. *Riley v. Carter*, 443.
11. **PREFERENCES.**—Under the Missouri statute a preference of any creditor in a voluntary assignment for the benefit of creditors renders such assignment void. *Larrabee v. Franklin Bank*, 774.
12. **BY INSOLVENT CORPORATION—PREFERENCE AVOIDING DEED.**—If an insolvent corporation assigns the greater part of its property to a creditor, thereby being compelled to suspend, and immediately assigns the remainder of its assets for the benefit of its creditors, both transactions will be considered as a single attempt to evade the assignment law; and such creditor having notice of all the facts and circumstances, and being a party thereto, will not be allowed to profit by the transaction at the expense of the other corporation creditors, but will be compelled to share *pro rata* with them in all the assets of the insolvent corporation. *Larrabee v. Franklin Bank*, 774.
13. **PREFERENCE BY CORPORATIONS.**—An insolvent debtor, whether a corporation or a private person, may prefer a *bona fide* creditor to the exclusion of others unless such preferment deprives the corporation of

the power to continue in its due course of business and renders it necessary for it to suspend. *Larrabee v. Franklin Bank*, 774.

14. **FACT ADMITTED BY DEMURRER.**—An allegation in a complaint that an assignment for the benefit of creditors was made with intent to hinder, delay, and defraud creditors, and is therefore void, is legally sufficient and charges with certainty a fact which is admitted by demurrer. *Riley v. Carter*, 443.
15. **CUSTODY OF LAW.**—Property which has been assigned for the benefit of creditors, and possession of which has been taken by the assignee, is in the custody of the law if the statute under which the assignment was made provides that the assignee shall at all times be subject to the order and supervision of the court or judge, and may by citation be compelled from time to time to file reports of his proceedings and of the situation and condition of the trust, and to proceed to the faithful execution of his duties. *Hamilton-Brown Shoe Co. v. Mercer*, 331.

See TRUSTS, 12.

ASSOCIATIONS.

See BAILMENT, 3; INSURANCE, 9-15.

ASYLUMS.

See MUNICIPAL CORPORATIONS, 10-13; STATUTES, 11.

ATTACHMENT.

1. **ATTACHMENT PROCURED BY FALSE AFFIDAVIT.**—If an attachment is procured by plaintiff's filing an affidavit that the debt upon which he sues is not secured, and a bond is given to release property from a levy made under such attachment, the obligors in the bond may successfully resist the action against them thereon by establishing the falsity of such affidavit. *Murphy v. Montandon*, 279.
2. **GARNISHMENT OF EXEMPT WAGES IN ANOTHER STATE.**—Wages due and payable in this state to the employee of a railroad corporation, resident and doing business here, and here exempt from execution cannot be garnished in another state, so as to defeat the exemption laws of this state. *Illinois etc. R. R. Co. v. Smith*, 651.
3. **SITUS OF DEBT FOR PURPOSE OF GARNISHMENT** is in the state in which the debtor and creditor are both resident, and in which the contract creating the debt was made, and is payable. *Illinois etc. R. R. Co. v. Smith*, 651.
4. **A COUNTY IS NOT SUBJECT TO GARNISHMENT.** *Riggins v. Hilliard*, 113.
5. **CORPORATE STOCK CANNOT BE ATTACHED OR SUBJECTED TO A GARNISHER PROCESS** unless the authority for that purpose is expressly conferred by statute. *Armour etc. Banking Co. v. St. Louis Nat. Bank*, 691.
6. **ATTACHMENT OF STOCK OF A FOREIGN CORPORATION** is not possible in Missouri, because as to such corporation there can be no compliance with the statutes of the state requiring the sheriff to leave with the secretary of the corporation a copy of the writ, and also of his return of the execution, after such shares have been sold. *Armour etc. Banking Co. v. St. Louis Nat. Bank*, 691.
7. **CORPORATIONS.**—STOCK CERTIFICATES ARE ONLY THE EVIDENCE OF OWNERSHIP OF STOCK, not the stock itself. Therefore shares of stock in a foreign corporation cannot be attached by levying an attach-

ment on the certificates of such stock in the state where suit is brought.

Armour etc. Banking Co. v. St. Louis Nat. Bank, 691.

2. **AN ATTACHMENT IS NOT PRESUMED TO HAVE BEEN ABANDONED** from the fact that the writ under which it was levied was directed to be returned and a new writ issued under which a second levy was made on the same property. *Wright v. Westheimer*, 289.

See **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 6; **HOMESTEAD**, 5.

ATTORNEY-GENERAL.

See **COURTS**, 3, 4.

ATTORNEYS.

See **EVIDENCE**, 8; **FALSE IMPRISONMENT**, 3; **INDICTMENT**, 1; **JUDGMENTS**, 9, 10.

AUCTIONS.

1. **AUCTIONEER IS LIABLE FOR SELLING THE PROPERTY OF ANOTHER** unless he can show some other excuse or justification than his good faith and his ignorance of the true owner's title. *Robinson v. Bird*, 495.
2. **CONDITIONAL SALE.—AN AGREEMENT, PURPORTING TO BE A LEASE**, between the owners of property and another, and stipulating that the latter, for the use of certain personal property, had paid a specified sum as rent, and would pay a further designated sum monthly until such time as the sums so paid should amount to another sum specified, after which such property should belong to the lessees, but that in default of payment such lessors might, without demand, take possession of such property, does not give the lessees any title which they can mortgage to the prejudice of the lessors. If a mortgage is made, and thereafter, by the direction of the mortgagee, the property is sold by an auctioneer, he is answerable to the owners for its conversion if the lessees were in default at the time of such sale, and therefore had no right to the immediate possession of the property. It is not material that the auctioneer was mistaken as to the ownership of the property if the owners had not contributed to such mistake otherwise than by entering into the agreement and giving the lessees possession thereunder. *Robinson v. Bird*, 495.

AWARDS.

See **ARBITRATION**.

BAILMENT.

1. **A GRATUITOUS BAILEE IS LIABLE** only for fraud or such gross negligence as amounts to fraud. *Hibernia Building Assn. v. McGrath*, 828.
2. **GRATUITOUS BAILEE—OFFICER IN CORPORATION.**—A treasurer or director in a corporation may become a gratuitous bailee by serving without compensation and liable only for fraud or gross negligence amounting to fraud. *Hibernia Building Assn. v. McGrath*, 828.
3. **GRATUITOUS BAILEE—TREASURER OF BUILDING ASSOCIATION** receiving no pay for his services, though giving a bond for their faithful performance, is a gratuitous bailee, and is not liable for the loss of money paid by him in good faith for stock withdrawals, without an examination of the minutes of the association to ascertain if the board of directors had acted upon such withdrawals, when the order upon which

the money is paid is drawn in the usual form, signed by the president and payee, and attested by the secretary, as required by the by-laws of the association; nor does it make any difference that he pays the money to such secretary instead of the payee named, if he has no reason to suspect his dishonesty, and it is usual and customary to pay such money to him for the members of the association. *Hibernia Building Assn.* 828.

6. **THE SALE OF PROPERTY BY A BAILEE FOR HIRE** in possession thereof, though to an innocent purchaser, does not vest the title of the bailor. The rule that where one of two innocent persons must suffer the loss should fall on him whose act or omission made the loss possible is inapplicable. *Miller Piano Co. v. Parker*, 873.

See COTENANCY, 4, 6; PLEDGE.

BANKS.

1. **OFFICER TRANSACTING BUSINESS AT HIS OWN BANK.**—A person has a perfect right to transact his own business at the bank of which he is an officer, and in such transaction his interest is adverse to the bank and he represents himself and not it. *Merchants' Nat. Bank v. Lovitt*, 770.
2. **TRANSACTION BETWEEN BANK AND ITS OFFICER—NOTICE TO OFFICER AS NOTICE TO BANK.**—When a vice-president of a bank offers it a note of which he is the owner for discount, and the bank discounts the note, placing the amount thereof to his credit without knowledge on the part of the bank president or of any of its other officers of facts affecting the consideration for the note, the bank is not chargeable with notice of such uncommunicated facts affecting the title to the note and rendering it invalid. *Merchants' Nat. Bank v. Lovitt*, 770.

See CORPORATIONS, 11; ESTOPPEL, 2; GIFTS, 2.

BENEFIT SOCIETIES.

See INSURANCE, 9-15.

BEQUEST.

- WILLS—BEQUEST OF PERSONALTY—CONSTRUCTION OF WORD "HEIRS."**—In a bequest of personalty, the word "heirs" signifies heirs as ascertained by the statute of distributions. *Gilmor's Estate*, 855.

See CHARITIES, 2.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS, 1.

BILLS OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS.

BILLS OF LADING.

See RAILROADS, 17.

BILLS OF SALE.

See REPLEVIN, 1.

BLANKS.

See NEGOTIABLE INSTRUMENTS, 11.

BOARDERS.

See INNKEEPERS, 2, 3.

BONA FIDE PURCHASERS.

See MECHANIC'S LIEN, 11.

BONDS.

**See ATTACHMENT, 1; BAILMENT, 3; EXECUTOR AND ADMINISTRATOR, 2, 4;
HUSBAND AND WIFE, 1.**

BURDEN OF PROOF.

**See COVENANT, 3; MECHANIC'S LIEN, 17; MORTGAGE, 4; PAYMENT, 2;
RAILROADS, 23; WILLS, 16, 19-21.**

BY-LAWS.

See CORPORATIONS, 4.

CAPACITY.

See WILLS, 2-7.

CARRIERS.

CONNECTING—BEGINNING OF LIABILITY OF.—The liability of a connecting carrier does not begin and the duty of the first carrier is not completed until there has been an actual delivery to the connecting carrier.
Vannatta v. Central R. R. Co., 823.

See RAILROADS, 4-6, 19, 20.

CAVEAT EMPTOR.

See EXECUTION, 5; JUDICIAL SALES; PUBLIC LANDS, 2.

CAUSA MORTIS.

See GIFTS, 1.

CEMETERIES.

See CORPORATIONS, 1; MUNICIPAL CORPORATIONS, 4.

CENSUS.

See CONSTITUTIONS, 2.

CERTIFICATES.

**See ATTACHMENT, 7; COVENANT, 10; INSURANCE, 9, 10; PUBLIC LANDS,
TAXES, 3.**

CERTIFICATES OF DEPOSIT.

See GIFTS, 2.

CERTIFIED COPIES.

See EVIDENCE, 6; JUDGMENTS, 7, 8.

CERTIORARI.

See COURTS, 1.

CHANCE VERDICTS.

See TRIAL, 4.

CHANGE OF VENUE.

See PROCESS, 2.

CHARACTER.

See EVIDENCE, 4; HOMICIDE, 1-4.

CHARITIES.

1. A TRUST FOR EDUCATIONAL PURPOSES is a good charitable trust, whether the benefits of the gift are confined to a particular locality or not. *Sears v. Chapman*, 502.
2. A DEVISE AND BEQUEST of the testator's property for the benefit of the inhabitants of East Dennis and vicinity, for educational purposes, one-third of the property to be appropriated for a building to be located on Quivet Neck in East Dennis, and the other two-thirds to be for the support of such institution, and the whole to be under the exclusive control of the inhabitants of Quivet Neck, is a good gift to charity. *Sears v. Chapman*, 502.
3. WILLS.—A devise to a pastor of a church will not be deemed charitable merely from the nature of the professional character of the devisee. In the absence of any evidence tending to fasten upon him a trust for either religious or charitable purposes he is entitled to such gift in his own right. *Hodnett's Estate*, 851.
4. GIFT FOR A SPECIFIC CHARITABLE PURPOSE WILL NOT FAIL FOR WANT OF A TRUSTEE. *Sears v. Chapman*, 502.

CHARTERS.

See CORPORATIONS, 4.

CHATTEL MORTGAGES.

INDEPENDENT CONTRACT—NECESSITY FOR RECORDING.—A receipt taken by the mortgagee and vendor, from the mortgagor and vendee of cattle, which recites that such cattle are subject to a prior mortgage which the vendor will have released, or return the mortgage to the vendee and cancel the sale, but which is not referred to in the mortgage forms as part thereof, and is an independent contract which need not be recorded for the purpose of imparting notice. *National Bank v. Morris*, 754.

See NOTICE, 1-3; TROVER.

CHURCHES.

See CHARITIES, 3.

CIVIL RIGHTS.

See RAILROADS, 7, 8.

CODICILS.

See WILLS, 23.

COLLATERAL ATTACK.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 5; JUDGMENTS, 10, 11; PROCESS, 1.

COLLATERAL SECURITY.

See PAYMENT, 1; PLEDGE; TRUSTS, 2.

COMMON CARRIERS.

See CARRIERS.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE, 6.

CONFESSION OF JUDGMENT.

See TRUSTS, 8.

CONFLICT OF LAWS.

THE PERIOD OF MAJORITY of persons bringing suit must be settled according to the laws of the forum, though they reside in another state. *Burgess v. Wilkford*, 96.

See CONTRACTS, 1; INSURANCE, 11.

CONSIDERATION.

See ASSIGNMENT, 3; CONTRACTS, 5; CORPORATIONS, 10; EVIDENCE, 10; FRAUD; HUSBAND AND WIFE, 11; NEGOTIABLE INSTRUMENTS, 1, 2.

CONSOLIDATION.

See CORPORATIONS, 26.

CONSTITUTIONS.

1. CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—EQUALITY OF POPULATION.—Under a constitutional provision that the state legislature shall redistrict the members of the senate and assembly according to the number of inhabitants, such districts must be as nearly equal in population as other constitutional requirements will permit, and the requirement as to equality of population in each district is just as applicable to two or more assembly districts in a single community as to an assembly district composed of two or more counties. *State v. Cunningham*, 27.

2. CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—BASIS OF POPULATION.—A constitutional provision that the legislature, at its first session after the taking of a state or federal census, shall reapportion and redistrict the members of the senate and assembly according to the number of inhabitants, fixes the population of the last census as the basis of apportionment. *State v. Cunningham*, 27.

3. CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT.—When, under a constitutional provision that the apportionment of the state into senate and assembly districts shall be according to the number of inhabitants, and that the districts are to be bounded by county, precinct, town, or ward lines, and be in as compact form as practicable, it is found difficult to divide a city into districts with an approximate equality in the number of inhabitants, compactness in form of the districts being of less importance, may, to some extent, yield to secure a nearer approach to equality of representation; but it can never be made to yield in aid of securing inequality in representation. *State v. Cunningham*, 27.

See CORPORATIONS, 10; COURTS; EMINENT DOMAIN; EVIDENCE, 5; LEGISLATURE, 1, 2, 5; STATUTES, 5, 9, 10.

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CONSTITUTIONAL LAW.

See CONSTITUTIONS; COURTS; LEGISLATURE; STATUTES.

CONTINUANCE.

See ACTIONS, 1; APPEAL, 2.

CONTRACTS.

1. **CONFLICT OF LAWS—AGREEMENT TO FORM A CORPORATION, BY WHAT LAWS CONSTRUED.**—Where specific performance of a contract to form a corporation, which is finally organized under the laws of another state, is sought in the state in which the contract was made, in which its subject matter is situated, and in which it is to be performed, and there is nothing to show that the parties intended that the organization should be effected under the laws of any other state, the contract will be interpreted in the light of the constitution and laws of the state in which the suit is brought. *Garrett v. Kansas City Coal Min. Co.*, 712.
2. **CONTRACT GUARANTEEING THAT A HEATER SHOULD GIVE ENTIRE SATISFACTION** in its operation and that, should it prove unsatisfactory, after a fair and reasonable trial, it should be removed, is not complied with by constructing a heater of the dimensions and materials stipulated for in the contract, if, notwithstanding such contract, the other party is not satisfied with it. It is not sufficient that it is satisfactory to others, or that he ought to be satisfied with it, provided his dissatisfaction is genuine and not capricious nor dishonest. *Adams Radiator etc. Works v. Schnader*, 893.
3. **A CONTRACT TO CONSTRUCT A HEATER TO THE SATISFACTION OF A PARTY**, on his death before the heater has been tested, is not complied with if the heater is not satisfactory to his executor and devisee by whom it is tested. *Adams Radiator etc. Works v. Schnader*, 893.
4. **CONTRACT THAT A HEATER SHOULD HAVE A FAIR AND REASONABLE TRIAL** contemplates a trial by the householder under the supervision and attendance of the ordinary household servants. It is not expected that he will daily employ skilled plumbers and engineers to operate it. *Adams Radiator etc. Works v. Schnader*, 893.
5. **WHEN SEVERABLE.**—If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied under the law, such a contract will generally be held to be severable; but if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject thereof may consist of several distinct and wholly independent items. *Fullmer v. Post*, 881.
6. **PARTIES IN PARI DELICTO.**—If a contract, otherwise unobjectionable, is prohibited by a statute which imposes a penalty upon one of the parties only, the other party is not in *pari delicto*, and he, upon disaffirming the contract, may recover against the party upon whom the penalty is imposed for any money or property which has been advanced upon such contract. *Bond v. Montgomery*, 119.
7. **WHEN VOID AS AGAINST PUBLIC POLICY.**—If a contract is of such a nature that it cannot be carried into execution without reaching beyond the parties, and exercising an injurious influence over the community at large, everyone has an interest in its suppression, and, from a due regard to the public welfare, it will be declared void. *Breaks v. Cooper*, 793.

8. **WHEN VOID AS AGAINST PUBLIC POLICY.**—Contracts are against public policy, and therefore void, whenever their subject matter tends to produce injustice or oppression, restraint of liberty or of legal right, to obstruct or pervert the administration of the law, to interfere with or control executive, legislative, or other official action; or to prevent competition, whenever [a statute or any known rule of law requires it. *Brooks v. Cooper*, 793.
9. **CONTRAVENING STATUTES, INVALIDITY OF.**—An agreement which discloses an intention to contravene a statute, in fraud of the public, or to the injury of private parties, savors of a conspiracy, and is vicious and unenforceable. If such an intention is once found to exist, the law cannot presume that the agreement is without the effect intended by the parties, in order to confer upon it the quality of enforceability. *Brooks v. Cooper*, 793.
10. **CONTRACT IS NOT ENFORCEABLE WHICH CONTRAVENES THE POLICY OF A STATUTE.**—The policy of a statute requiring “the governor, comptroller, and secretary of state, or a majority of them,” to designate, every year, the newspapers which are to publish the laws in each county—the selection to be carried out on such a basis that the publication may be made in the newspapers having the largest circulation, and in as many newspapers belonging to each of the two leading political parties of the county as there are representatives from such county in both branches of the legislature—is contravened by an agreement in which the proprietors of two newspapers, both of which belong to one of the two leading political parties of a certain county, stipulate that “there shall be no antagonism between them in their efforts to obtain the business of the publication of the laws of the state for their respective newspapers” during a specified period, and that “in case of the designation of either paper to publish the laws, the net amount received for this service, after paying the expenses of the said publication, shall be equally divided between the two newspapers.” Such a contract on its face assumes to control the manner in which the selection of the newspapers shall be made, and virtually attempts to dictate to the public body appointed by law to administer the statute a course of action inconsistent with those provisions which designate the objects, purposes, and policy of the legislature. *Brooks v. Cooper*, 793.
- See ATTACHMENT, 3; CHATTEL MORTGAGES; CORPORATIONS, 9, 10, 21-26; DAMAGES, 1; EQUITY, 3, 4; HUSBAND AND WIFE, 6, 8; MISTAKE, 1; MUNICIPAL CORPORATIONS, 15; NOTICE, 2; RAILROADS, 17; SALES; WILLS, 5.

CONVERSION.

See AUCTIONS, 2; TROVER.

CONVEYANCES.

See DEEDS; FRAUDULENT CONVEYANCES; MORTGAGES.

CORPORATIONS.

1. **CORPORATION, WHETHER PUBLIC OR PRIVATE.**—A corporation whose members are to consist of all persons having burial lots in a specified cemetery who shall notify the clerk of their acceptance of the act creating it, and which is made subject to the provisions of the statutes of the state relating chiefly to private cemetery companies, and which is given

the same rights, and subjected to the same duties and liabilities as the municipality by which the cemetery had been owned and managed, is a private corporation. *Mount Hope Cemetery v. Boston*, 515.

2. **MEETINGS OF STOCKHOLDERS—WHERE SHOULD BE HELD.**—Under a statute providing that articles of association shall state the city or town and county in which a corporation is situated, the acts of the body corporate itself, such as elections of directors, votes to increase or diminish the stock, and other meetings of the stockholders, should take place at the home office. *Missouri Lead Min. etc. Co. v. Reinhard*, 746.
3. **MEETINGS IN FOREIGN COUNTRY.**—When there is no prohibitory statute, and all of the shareholders give their consent, their acts at a meeting of the corporation held in a foreign jurisdiction are valid. *Missouri Lead Min. etc. Co. v. Reinhard*, 746.
4. **MEETINGS IN FOREIGN JURISDICTION.**—The directors of a corporation may hold meetings and transact business in another state unless the contrary is expressly provided for by the charter, by-laws, or the general laws of the state under which the corporation is organized. *Missouri Lead Min. etc. Co. v. Reinhard*, 746.
5. **MEETING HELD IN FOREIGN JURISDICTION.**—All of the stockholders and directors of a domestic corporation may hold a meeting in a foreign jurisdiction; and their action there in making a contract for the sale of the corporate property and in directing the president to execute a deed, and his act in executing and delivering it there, are as valid as if performed in the office of the domicile of the corporation. *Missouri Lead Min. etc. Co. v. Reinhard*, 746.
6. **WHEN CHARGEABLE WITH KNOWLEDGE OF AGENT.**—Knowledge casually obtained by a corporate agent is not imputed to the corporation, unless the corporation acts through such agent in a matter in which the information possessed by him is pertinent. *Willard v. Denise*, 788.
7. **NOTICE TO OFFICER.**—When an officer of a corporation is dealing with it in his individual capacity and interest, the corporation is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the property which is the subject of the transaction. *Merchants' Nat. Bank v. Lovitt*, 770.
8. **ACTS OF DE FACTO OFFICERS** OF are valid as regards the public and third persons. *Richards v. Farmers' etc. Institute*, 848.
9. **CORPORATIONS ARE LIABLE UPON CONTRACTS MADE BY DE FACTO OFFICERS THEREOF**, although such officers are subsequently ousted from office, on the ground of the invalidity of their election. *Richards v. Farmers' etc. Institute*, 848.
10. **FICTITIOUS STOCK, ILLEGAL AGREEMENT FOR ISSUE OF.**—A party to a contract by which a large amount of paid-up capital stock in a corporation, to be afterwards organized for the development of certain lands, is to be issued to him in exchange for his equitable rights in options on those lands, and for his services in promoting the corporation, cannot procure the enforcement of such contract, where it is apparent on the face of the instrument that his interest in the land and his services, when taken together, are nothing like a fair equivalent for the face value of the stock which he is to receive. Such a contract contravenes the express provisions of the constitution and statutes of Missouri, as well as the general policy of the law, requiring that the subscribers to corporate stock should pay in money or money's worth. *Garrett v. Kansas City Coal Min. Co.*, 713.

11. **SUBSCRIPTION TO BANK STOCK PROCURED BY MISREPRESENTATION** is voidable only and can only be avoided subject to the rights of creditors where there is a winding up order or a voluntary winding up. The intervening rights of creditors and other stockholders call for prompt action on the part of a subscriber who seeks to avoid liability for his subscription on the ground of fraud. *Howard v. Turner*, 883.
12. **LACHES IN SEEKING TO AVOID A SUBSCRIPTION TO STOCK OF A BANK** on the ground that it was procured by misrepresentation is fatal to the right of rescission. This rule was applied when, after a subscription to stock of a bank, it failed and a scheme was devised for its reorganization, and the subscriber participated in the proceedings looking to such reorganization, and did not undertake to rescind his subscription until after suit was brought on a note given thereon. *Howard v. Turner*, 883.
13. **SUBSCRIPTION TO STOCK OF A CORPORATION MADE BY DEFENDANT** but to which he signed his wife's name instead of his own because he had some doubt about his right to take stock in such corporation is enforceable in an action against him. *Shields v. Casey*, 879.
14. **CAPITAL STOCK, WHEN TRUST FUND.**—The capital stock and other property of a corporation constitute, as between creditors and stockholders, a trust fund for the payment of the debts; and if such property has been divided among the stockholders, leaving debts unpaid, the stockholders are in equity bound to refund. *Missouri Lead Min. etc. Co. v. Reinhard*, 746.
15. **FRAUDULENT CONVEYANCE.**—The fact that a domestic corporation at the time of conveying its property to a foreign corporation failed to provide for the payment of a single contested claim does not raise a presumption that the sale was made to defraud creditors when the circumstances tend to show that there was no actual fraud in the transaction. *Missouri Lead Min. etc. Co. v. Reinhard*, 746.
16. **TRANSFER OF PROPERTY BY—REMEDY OF CREDITOR OR EXECUTION PURCHASER.**—If a corporation transfers all its property to another corporation a creditor of the transferring corporation has his remedy against the old stockholders or the new corporation by bill in equity; and an execution purchaser of the property of the old corporation under a judgment in favor of such creditor is entitled to be substituted to the latter's rights only to the amount of his bid with interest. *Missouri Lead Min. etc. Co. v. Reinhard*, 746.
17. **INSOLVENCY OF CREDITORS HOW AFFECTED BY.**—The insolvency of a corporation does not *per se* abrogate its power to continue the management of its assets. It may continue in its due course of business so long as there is a fair and honest prospect of redeeming its fortunes, and may pay off debts in the regular course of business, although a part of the creditors are thereby deprived of their security. *Larrabee v. Franklin Bank*, 774.
18. **DIVIDENDS, RIGHT OF ACTION FOR.**—When a dividend has been declared and become payable according to the terms of the vote declaring it each stockholder has the right to demand payment of the proportional part which belongs to his share of stock, and to sue the corporation for it if it does not pay on demand. *Ford v. Easthampton Rubber etc. Co.*, 462.
19. **CONSIDERATION FOR THE PROMISE OF A CORPORATION TO PAY A DIVIDEND IS NOT REQUIRED.**—The cause of action in favor of each stock-

- holder and against the corporation does not arise from any actual contract between the corporation and its stockholders, but from the nature of the organization and the relation of the stockholders to the corporation and its property. *Ford v. Easthampton Rubber etc. Co.*, 462.
20. **DIVIDENDS, RIGHT TO RESCIND VOTE THEREFOR.**—If a dividend has been declared by a vote of the directors, payable at a future time, the vote declaring it may be rescinded at a subsequent meeting of the directors, held before the dividend becomes payable, and before the fact that it has been declared has been made public, or communicated to the stockholders, or any fund set aside for its payment. *Ford v. Easthampton Rubber etc. Co.*, 462.
21. **ULTRA VIRES.**—A CONTRACT MADE BY A CORPORATION WHICH IS UNLAWFUL and void, because beyond its corporate powers, does not by being carried into execution become lawful and valid. The proper remedy of an aggrieved party is to disaffirm the contract and sue to recover as upon a *quantum meruit* the value of what the defendant has actually received the benefit of. *Brunswick Gas etc. Co. v. United Gas etc. Co.*, 385.
22. **ULTRA VIRES CONTRACT NOT ENFORCEABLE IN EQUITY.**—A contract that a corporation shall issue stock as fully paid up, when in fact the payment is intentionally fictitious, is *ultra vires*, and therefore not enforceable in equity. *Garrett v. Kansas City Coal Min. Co.*, 713.
23. **CONTRACT ULTRA VIRES, REMEDY UPON.**—An *ultra vires* contract will not be specifically enforced in equity, nor will an action at law lie thereon; but if it has been partially or completely executed by either of the parties he may, by proceeding in the proper court, recover to the extent of the benefit received by the other party. *Greenville Compress etc. Co. v. Planters' Compress etc. Co.*, 681.
24. **ULTRA VIRES, PLEA OF, WHEN NOT ALLOWED TO PREVAIL.**—A corporation which engages in the occupation of an innkeeper, assumes the liability of an innkeeper towards a guest, and receives from such guest the consideration for that liability, cannot repudiate its obligation upon the ground that, under its corporate powers, it was not authorized to engage in such occupation. *Mages v. Pacific Imp. Co.*, 199.
25. **ULTRA VIRES AGREEMENTS, PARTIAL EXECUTION OF.**—Where a temporary injunction has been issued granting the prayers of a bill which has been filed by a corporation, asking for an injunction to restrain another corporation from resuming the control of its business, and thus interfering with the action of a joint committee of management appointed as a preliminary to the execution of an illegal agreement to consolidate the corporations, and also for an account of moneys received by the defendant corporation from the time when it resumed control to the time when the bill was filed, it is proper, before a final decree disposing of the case is entered, to order an account to be taken of the moneys received by the joint committee also, in order that it may be determined how much the parties to the illegal agreement are entitled to by reason of its having been partially executed through the action of such committee. To enter a final decree without ordering such an accounting is erroneous. *Greenville Compress etc. Co. v. Planters' Compress etc. Co.*, 681.
26. **AGREEMENT TO CONSOLIDATE, WHEN ULTRA VIRES.**—An agreement between two corporations to effect a consolidation thereof is *ultra vires* and invalid unless the power to consolidate is expressly conferred by

the corporate charters. *Greenville Compress etc. Co. v. Planters' Compress etc. Co.*, 681.

27. **FRANCHISE, ASSIGNABILITY OF.**—A gas company possessing and exercising the right to lay its pipes in the public streets cannot sell, lease, nor assign its corporate rights and privileges to another gas company without the consent of the legislature. *Brunswick Gas etc. Co. v. United Gas etc. Co.*, 385.
28. **POWER TO PURCHASE LAND IN ANOTHER STATE.**—A foreign corporation which by its articles of incorporation and the laws of the state or country in which it is organized is empowered to purchase, hold, and operate mining lands in a certain foreign state or elsewhere, may purchase, hold, and operate such mines in that state unless prohibited by its laws. *Missouri Lead Min. etc. Co. v. Reinhard*, 746.
29. **CORPORATION EXECUTING A LEASE OF ITS PROPERTY WHICH IS VOID,** because it had no power to give such lease, cannot, though possession is taken and held under the lease, recover the rent stipulated therein. It may, however, recover a reasonable rent, and the lease may be offered in evidence as an admission of what rent is reasonable. *Brunswick Gas etc. Co. v. United Gas etc. Co.*, 385.
30. **PLEADING CORPORATE EXISTENCE.**—In an action against a private corporation it is necessary to allege its corporate character. The words, "a corporation," following the name of the defendant in the caption of the complaint, do not dispense with the necessity of averring corporate existence. The want of this averment may be urged under a general demurrer to the effect that the complaint does not state facts sufficient to constitute a cause of action. *Miller v. Pine Mining Co.*, 289.
- See **AGENCY**, 1; **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 12, 13; **ATTACHMENT**, 5-7; **BAILMENTS**, 2; **CONTRACTS**, 1; **MUNICIPAL CORPORATIONS**; **NEGOTIABLE INSTRUMENTS**, 10.

COSTS.

1. **THE FEES OR COMPENSATION OF EXPERTS** employed by the prevailing party to make investigation and to testify at the trial are not allowable as costs against his adversary under a statute authorizing the including in a cost bill by the prevailing party "of the items of his costs and necessary disbursements in the action or proceeding." *McDonald v. Burke*, 276.
2. **APPLICATION TO RETAX, NOT MADE WITHIN TIME.**—Though a statute provides that a party dissatisfied with the costs claimed may, within three days after the filing of the bill of costs, file a motion to have the same retaxed by the court, the failure to file such motion within that time does not preclude the court from granting a motion made thereafter, if the statute does not require any notice to be given of the filing of the cost bill, and does authorize the court, within six months after the adjournment of the term, to relieve a party from any judgment, order, or other proceeding taken against him through his mistake, inadvertence, or excusable neglect. *McDonald v. Burke*, 276.

COTENANCY.

1. **WHAT CONSTITUTES.**—If two or more persons are entitled to land in such manner that they have an undivided possession, but several freeholds, they are tenants in common. The only common characteristic of a tenancy in common is that of undivided possession. *Metcalfe v. Miller*, 617.

2. **POSSESSION OF ONE COTENANT** is the possession of all, and each has the present right to enter upon the whole land, and upon every part of it, and to occupy and enjoy the whole. *Metcalf v. Miller*, 617.
3. **ADVERSE POSSESSION—BURDEN OF PROOF.**—As between cotenants the burden is upon the one claiming to hold adversely to establish such a state of facts, known to his cotenant, as will amount to an adverse claim of title. Notorious possession alone is not sufficient. *Stewart v. Stewart*, 67.
4. **RIGHT TO POSSESSION—RECOVERY FROM COMMON BAILEE.**—Each cotenant has a right to the possession of all property held in cotenancy equal to the right of each of his companions in interest, and superior to that of all other persons; but the possession of personal property owned by cotenants cannot be recovered from their common bailee in an action brought by one or less than all of them, unless such property is severable in its nature, or a remedy is provided by statute. *George v. McGovern*, 77.
5. **A PURCHASE BY A COTENANT OF THE LANDS OF A COTENANCY AT A TAX SALE** may vest title as against strangers. If the other cotenants do not complain a stranger cannot. *Burgett v. Williford*, 96.
6. **ACTION BY ONE COTENANT AGAINST COMMON BAILEE—DEMAND.**—When cotenants of personal property deliver it into the keeping of a third person he may detain it until all of the cotenants ask for its return and one of them cannot maintain an action to recover his share as against such common bailee without a demand in writing as provided by statute. *George v. McGovern*, 77.
7. **LIEN FOR RENTS.**—A tenant in common has no lien against his cotenant's interest in the common property for rents in excess of his share collected and retained by such cotenant before partition. *Flack v. Gosnell*, 413.
8. **LIABILITY OF COTENANT FOR RENTS COLLECTED.**—The claim of one cotenant for his share of rents collected and retained by another, is recoverable at law, and suit may be instituted therefor at any time, but such claim creates no lien on the undivided interest in the land of the tenant collecting the rents. *Flack v. Gosnell*, 413.
9. **LIABILITY OF COTENANT FOR RENTS COLLECTED WITHOUT EXPRESS AUTHORITY.**—The fact that one cotenant assumes the right or duty to collect the rents arising from the common property without being made a bailiff by express authority, does not change the nature of his cotenant's claim for his share of such rents, nor subject the former to any other or greater liability for the rents so collected by him than if he had been duly and fully authorized to collect them. *Flack v. Gosnell*, 413.
10. **JOINT TENANCY IN LIFE INSURANCE.**—A membership certificate of life insurance issued to a husband in which his wife and daughter are named as beneficiaries makes them joint tenants as to the fund, with right of survivorship. *Farr v. Trustees*, 73.

See JUDGMENTS, 5, 6; PARTITION, 4, 5.

COUNSEL

See NEW TRIAL, 2, 3.

COUNTIES.

See ATTACHMENT, 4; CONSTITUTIONS, 1; CREDITOR'S SUIT.

COURTS.

1. **CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT.**—A state constitutional clause conferring upon the supreme court original jurisdiction to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and other original and remedial writs, is designed to give to that court original jurisdiction of all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people. *State v. Cunningham*, 27.
2. **CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT.**—In matters strictly *publici juris* in which no one citizen has any right or interest other than that which is common to citizens in general, a petition by a private person for leave to commence an action in the supreme court of the state under an original or remedial writ in the name of the state cannot properly be considered until the attorney-general has been requested to move in the matter, and has refused or unreasonably delayed to do so, and in all cases in which an exercise of such original jurisdiction is sought, whether by a private citizen or the attorney-general, leave must first be obtained from the court upon a *prima facie* showing that the case is one calling for the exercise of such jurisdiction. *State v. Cunningham*, 27.
3. **CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT TO CONTROL ACTS OF STATE OFFICER.**—The official acts of the secretary of state in issuing or publishing notices of an election of members of the legislature under an apportionment act alleged to be invalid are purely ministerial. In the exercise of its original jurisdiction the supreme court may control such acts by *mandamus* or injunction, as the exigencies of the cases may require. *State v. Cunningham*, 27.
4. **CONSTITUTIONAL LAW—JURISDICTION OF SUPREME COURT—REFUSAL OF ATTORNEY-GENERAL TO BRING SUIT.**—The power of the supreme court of the state in the exercise of its original jurisdiction to issue a writ of injunction in a proper case does not depend upon the volition of the attorney-general. After his refusal to bring suit, or to consent thereto, such court may entertain jurisdiction and issue an injunction upon the relation of a private citizen in the name of the state. *State v. Cunningham*, 27.

See JURISDICTION; STATUTES, 4.

CREDITOR'S SUIT.

- A CREDITOR'S BILL MAY BE SUSTAINED TO REACH MONEY DUE TO THE DEFENDANT FROM A COUNTY or other municipal corporation not subject to garnishment. If the court can ascertain that no inconvenience will result to the public, it will require the defendant to assign his demand to a receiver to be collected for the benefit of the complainant. *Riggin v. Hilliard*, 113.

CRIMINAL LAW.

See ACCOUNTING, 2; APPEAL, 3; ARREST; EXTRADITION; FORGERY; HOMICIDE; INJUNCTIONS, 1; JUDGMENTS, 13; ROBBERY; TRIAL.

CURTESY.

See PARTITION, 2, 3.

CUSTODY OF LAW.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 15.

DAMAGES.

1. **MEASURE OF.—FOR THE BREACH OF A CONTRACT TO FURNISH BOILERS AND MACHINERY FOR A BOAT** to be used at a summer pleasure resort, the damages allowable include the rental of the boat during the time the owner is deprived of its use, and also the value of his services and the sums necessarily paid to his employees during the time he and they were kept in idleness by reason of the breach of the contract. *Brownell v. Chapman*, 326.
 2. **DAMAGES MAY INCLUDE THE RENTAL VALUE OF A BOAT, THOUGH IT HAS NEVER BEEN COMPLETED** so that it could be rented, where its not being so completed was the result of a breach of the contract sued upon. Its rental value may be ascertained by the evidence of persons having knowledge of the business for which it was intended to be used and the price paid for the use of other boats in the same business. *Brownell v. Chapman*, 326.
 3. **EXEMPLARY DAMAGES FOR MALICIOUS INJURY TO PERSON OR PROPERTY.** In cases of malicious injury to the person or property it is not necessary that there should be actual enmity toward the injured party to enable him to recover exemplary damages. *Ten Hopen v. Walker*, 598.
 4. **DAMAGES IN ACTIONS OF TORT, PRESUMPTION OF.—**If an action sounds in tort, an instruction which directs the jury to find for the defendant, if the plaintiff "fails to prove that she has sustained either actual or possible damages," is erroneous. The law implies damages from every wrong. *Rose v. Louisville etc. Ry. Co.*, 686.
 5. **DEATH, DAMAGES FOR CANNOT INCLUDE PAIN AND SUFFERING.—**In an action by an administrator to recover damages for the death of his intestate resulting from the defendant's negligence, no allowance can be made for the pain and suffering of the decedent. The measure of damages is not the loss or sufferings of the deceased, but the injury resulting from his death to his family. Neither his pain and suffering nor the wounded feelings of his surviving relatives can be taken into account in estimating the damages. *Dwyer v. Chicago etc. Ry. Co.*, 322.
- See ANIMALS, 2, 3; ASSAULT; EQUITY, 2; EVIDENCE, 3; RAILROADS, 3, 10, 12, 14-16; SEDUCTION, 5.

DAMS.

See WATERS, 2.

DEATH.

See DAMAGES, 5.

DEBRIS.

See WATERS, 7.

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CORPORATIONS, 11, 14; EXECUTION, 9; EXECUTORS AND ADMINISTRATORS, 1; FRAUDULENT CONVEYANCES; MORTGAGES, 2; PAYMENT; PLEDGE, 2; SUBROGATION, 1, 4-6; TRUSTS, 6.

DECEDENT ESTATES.

See EXECUTORS AND ADMINISTRATORS.

DECLARATIONS.

See APPEAL, 3; DEEDS, 6; FORGERY, 2. TRUSTS, 1, 2; WILLS, 9-12, 15.

DEEDS.

1. **DELIVERY OF A DEED IS SUFFICIENTLY ESTABLISHED** where the trial court finds that the grantor placed it in the hands of a third party, instructing him to hold it for the grantee without recording it until the grantor's death, and thereupon to deliver it to the grantee, and that the grantor parted with all dominion over the deed, and reserved no right to recall it, nor to alter its provisions, or to have or enjoy any other or further interest in said premises than to hold the use thereof until his death. *Bury v. Young*, 186.
 2. **DELIVERY OF DEED, EVIDENCE INADMISSIBLE TO DISPROVE.**—Where a deed is given to a third person to be delivered to the grantee after the grantor's death, and the circumstances contemporaneous with the transfer showed that the grantor intended to surrender his control over the instrument, evidence that he afterwards executed other deeds purporting to convey the same property, and that he also ordered the depository to restore the deed, is incompetent for the purpose of showing what his intentions were in transferring the deed to such depository. *Bury v. Young*, 186.
 3. **DEEDS DELIVERED AFTER GRANTOR'S DEATH, WHEN VALID.**—The essential requisite to the validity of a deed which is given to a third party with instructions to deliver it to the grantee after the grantor's death, is, that when it is placed in the hands of such third party, it shall pass beyond the control of the grantor for all time. Whether control over it has been surrendered is determined by the grantor's intention in the matter, such intention being a question of fact, to be solved by the light of all the circumstances surrounding the transaction. *Bury v. Young*, 186.
 4. **IDENTIFYING LAND AFTER THE CONVEYANCE IS MADE.**—When a tract of land intended to be conveyed is not identified in the conveyance, the parties may afterwards survey and stake out the land conveyed, and if the grantee then takes possession, this ascertains the grant and gives effect to the deed. *Simpson v. Blaisdell*, 348.
 5. **CONVEYANCE OF ONE-HALF AN ACRE OF LAND NEAR THE WHARF, or at the wharf, and describing the wharf, is not void for uncertainty, if the parties, either before or after making the conveyance, survey, or stake out the parcel from the grantor's surrounding land, or the grantee takes possession of the particular parcel with the acquiescence of the grantor.** *Simpson v. Blaisdell*, 348.
 6. **DECLARATIONS TO SHOW LOCATION OF LAND CONVEYED.**—If land conveyed in a deed is described therein as a one-half acre tract near the wharf or at the wharf, the declarations of the grantor made subsequently as to the boundaries of the land so conveyed are admissible in evidence against one claiming title under him. *Simpson v. Blaisdell*, 348.
- See ASSIGNMENT FOR BENEFIT OF CREDITORS; CORPORATIONS, 5; EVIDENCE, 1, 6, 9; JUDGMENTS, 4-6; MISTAKE, 2, 3; MORTGAGES, 1-5; REAL PROPERTY, 1.

DE FACTO.

See CORPORATIONS, 8, 9; OFFICERS, 3, 4.

DEFINITIONS.

"And"—"or." *Gilmer's Estate*, 855.

Cotenancy. *Metcalf v. Miller*, 617.

"Damages." *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 706.

"Defendant." *Gibson v. Robinson*, 250.

"Heirs." *Gilmer's Estate*, 855.

"Innocent Purchaser." *Holdsworth v. Shannon*, 719.

Real Property. *Paris v. Norway Water Co.*, 371.

"Rushing." *Markley v. Whitman*, 558.

"Seduction." *Marshall v. Taylor*, 144.

DELEGATION.

See TRUSTS, 11, 12.

DELIVERY.

See DEEDS, 1-3; GIFTS, 2.

DEMURRER.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 14; CORPORATIONS, 22.

DEMURRER TO EVIDENCE.

See TRIAL.

DEVISE.

See CHARITIES, 2; TRUSTS, 3, 4.

DISTRIBUTION.

See REQUEST; INSURANCE, 10-12; TRUSTS, 3, 9.

DITCHES.

See WATERS, 2, 3.

DIVERSION.

See INJUNCTIONS, 3; WATERS, 7.

DIVIDENDS.

See CORPORATIONS, 18-20.

DIVORCE.

See WILLS, 29.

DOGS.

See ANIMALS.

DOMICILE.

See CORPORATIONS, 5.

DOWER.

See AGENCY, 4.

DRAINS.

See WATERS, 2.

EASEMENTS.

See EJECTMENT, 2; REAL PROPERTY; WATERS, 4.

EJECTMENT.

1. **PLEADING AND PRACTICE.**—It is error to deny plaintiff in ejectment the right to amend his complaint after issue joined by setting forth the estate claimed, and to deny him the right to submit to a nonsuit after the refusal to permit him to amend. *Ludeman v. Hirth*, 588.
2. **INTEREST SUFFICIENT TO MAINTAIN.**—An abutting lot-owner in a city owns the fee in the land to the center of the street, together with the right to its use, subject to the public easement, and has such an interest in the land lying between his lot and the center of the street as will entitle him to maintain ejectment against one who ousts him of such use and possession. *Smeberg v. Cunningham*, 613.
3. **RENTS RECOVERABLE IN.**—A plaintiff in ejectment cannot, under the Mississippi Code, recover rents accruing more than six years before the commencement of the action. *Lindenmayer v. Gunst*, 685.

ELECTION.

See ACCOUNTING, 2; ESTOPPEL; FORGERY, 1.

EMINENT DOMAIN.

- A **CITY LOT IS DEEMED TO BE "DAMAGED,"** within the meaning of a constitutional provision which forbids the "taking or damaging of private property for public use without compensation," whenever there is a public use of the adjacent street which diminishes the value of the lot by interfering with the enjoyment of those private rights in the nature of incorporeal hereditaments which the law attaches to such property, as a consequence of its abutting on the street. *Gaus etc. Mfg. Co. v. St Louis etc. R. R. Co.*, 706.

ENTIRETIES.

See HUSBAND AND WIFE, 12, 13.

EQUITY.

1. **EQUITY WILL NOT INTERFERE TO PREVENT A MULTIPLICITY OF SUITS,** unless the questions involved are of equitable cognizance. The mere fact that there is a community of interest in the questions of law and fact presented by a given controversy, or in the kind and form of relief demanded by or against each of several individuals will not warrant such interposition. *Tribette v. Illinois etc. R. R. Co.*, 642.
2. **LIMITS OF JURISDICTION TO PREVENT A MULTIPLICITY OF SUITS.**—A defendant sued for damages by several different plaintiffs, who have no community or tie connecting them, except that each has suffered by the same act of negligence, cannot enjoin them from prosecuting their actions separately at law, and compel them to obtain relief by a single suit in chancery. *Tribette v. Illinois etc. R. R. Co.*, 642.
3. **PARTIES TO AN ILLEGAL AGREEMENT STAND IN PARI DELICTO,** and neither can enforce the agreement against the other. *Garrett v. Kansas City Coal Min. Co.*, 713.
4. **ILLEGAL CONTRACTS—IN PARI DELICTO.**—A court of equity will not aid either party to an illegal contract, but will leave both where it finds them. *Brooks v. Cooper*, 793.

See ACCOUNTING, 1, 2; APPEAL, 5; ASSIGNMENT FOR BENEFIT OF CREDITORS, 7; CORPORATIONS, 14, 16, 22, 23; JUDGMENTS, 9; MISTAKE, 1; PARTNERSHIP, 1; SUBROGATION, 2; TRUSTS, 8, 10.

ERROR.

See APPEAL; CORPORATIONS, 25; DAMAGES, 4; EJECTMENT, 1; EVIDENCE, 3.

ESTATES.

REVERSIONS—NATURE OF ESTATE.—A reversioner has neither actual nor constructive possession of the land, nor the right to either, but has simply an estate in expectancy, the life estate intervening. *Matcalfe v. Miller*, 617.

See PARTITION, 2-5.

ESTOPPEL.

1. **REMEDIES—ELECTION.**—When one has a choice between two inconsistent rights or remedies, and deliberately makes his choice, such election becomes conclusive upon him and precludes him from subsequently pursuing the other right or remedy. *Crook v. First Nat. Bank*, 17.
2. **REMEDIES—ELECTION.**—An action *ex contractu* to recover money paid by a bank to defendant and received by him to the use of plaintiff, is an election by the latter to affirm the payment by the bank and he is thereby estopped from subsequently asserting as a basis for recovering the money from the bank that such payment was wrongful. *Crook v. First Nat. Bank*, 17.

See JUDGMENTS, 4, 7, 8.

EVIDENCE.

1. **DEED IN WHICH THE GRANTOR DESCRIBES HERSELF AS THE WIDOW AND SOLE HEIR** of J. C. B. does not prove nor tend to prove that she is such widow or heir. *Soukup v. Union Investment Co.*, 317.
2. **PUBLIC OFFICER**—It is not improper to permit a witness to testify that he was, at the time an assault was committed upon him, a district police officer and a deputy fish commissioner. *Commonwealth v. Wright*, 475.
3. **EVIDENCE OF OTHER FALSE AND WRONGFUL ACCUSATIONS.**—In an action by a married woman for an indecent assault, alleged to have been committed on her by the defendant, it is not proper to receive evidence, even in mitigation of damages, tending to prove that she, some twenty years before, had made false charges of a similar nature against other persons, and thereby obtained money from them. *Miller v. Curtis*, 469.
4. **WHEN CHARACTER IS IN ISSUE** it may be shown only by evidence of general reputation, and not by proof of specific acts. *Miller v. Curtis*, 469.
5. **CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—EVIDENCE.**—In an action to determine the validity of a legislative apportionment statute under a constitutional requirement that such apportionment shall be according to the number of inhabitants in each district, as shown by the last state or federal census, evidence is not admissible to show that in making the apportionment the legislature acted on the theory that certain counties contained more inhabitants than were given them by such census; nor is evidence admissible, in support of such apportionment.

ment, to show that one district, with a less population than another, was given the same representation because of the excessive assessed valuation of property therein, and the nature and character of its population and business interests. The legislature has no power to disregard the standard of apportionment as fixed by the constitution. *State v. Cunningham*, 27.

6. **CERTIFIED COPY OF A DEED OF TRUST** is admissible in evidence when the proof is sufficient to satisfy the mind of the trial court that the original is lost, and that it cannot be found after search made at the proper place. *Kleimann v. Giesekmann*, 761.
 7. **PRESUMPTION OF DELIVERY OF LETTER DULY MAILED.**—Depositing in the postoffice a properly addressed prepaid letter raises a presumption that it reached its destination in due course of mail. Such presumption may be rebutted by evidence showing that it was not received, and in the event of any conflict of evidence on this point the question is solely for the determination of the jury. *Jensen v. McCorkell*, 843.
 8. **JUDGMENTS BASED ON ATTORNEY'S APPEARANCE.**—It is presumed in favor of a judgment based on the appearance of an attorney that he is duly authorized to appear, even when such appearance is without service of process. In a collateral proceeding this presumption is conclusive. *Corbitt v. Timmerman*, 586.
 9. **DEED, EVIDENCE AS TO CONSIDERATION.**—A statement of the consideration in a deed and a recital of its payment may be varied and controlled by parol evidence. Therefore, notwithstanding such statement and recital, evidence may be admitted to prove that the price of the land was to depend on the number of square feet in its area, and that by reason of a mistake in computing such area the plaintiff paid a greater sum than was due from him. *Cardinal v. Hadley*, 492.
 10. **EVIDENCE OF INTENT OF TESTATOR.**—Extrinsic evidence cannot be adduced to qualify, explain, alter, or contradict the language of a will when the intention is clearly expressed and the objects of the bounty are definitely ascertained. To aid the context extrinsic proof of the circumstances and situation of the testator when the will was executed is admissible within the discretion of the court, and what was said at the time of its execution and attestation is admissible as part of the *res gestæ*, though not to contradict the will. *Gilmor's Estate*, 855.
- See APPEAL, 3-5; ARBITRATION, 1, 3; ATTACHMENT, 7; DEEDS, 2; EXECUTORS AND ADMINISTRATORS, 2, 4; FALSE IMPRISONMENT; FORGERY, 2; GIFTS, 1; HABEAS CORPUS; HOMICIDE, 1-5; INNKEEPERS, 2, 3; JUDGMENTS, 7, 8; LEGISLATURE, 3; MORTGAGES, 4, 5; NEGLIGENCE, 1, 2, 5; NEGOTIABLE INSTRUMENTS, 4; NEW TRIAL, 1; PAYMENT, 4; RAILROADS, 25, 26; SEDUCTION, 3; TAXES, 4; TRUSTS, 2; WILLS, 25; WITNESSES.

EXECUTION.

1. **EXECUTION LIENS—DELAY IN SALE.**—A lien on land existing by virtue of a levy under execution is not lost by delay in proceeding to sale when no fraudulent purpose is shown on the part of the execution creditor. The lien remains in force until the statute of limitations has barred any right to proceed to foreclose it. *Ludeman v. Hirth*, 588.
2. **EXECUTION SALES AFTER JUDGMENT IS BARRED.**—When proceedings to enforce the lien of an execution by sale are instituted before the right of action upon the judgment under which the execution issues is barred

- by the statute of limitations, they are valid, and the sale in pursuance thereof is legal. *Ludeman v. Hirth*, 588.
3. **EXECUTION SALE IS VOID UNLESS SUPPORTED BY A VALID JUDGMENT.**—Even if there was a judgment in existence at the time the writ of execution was issued, yet, if it has been vacated or satisfied before any sale is made under the execution, the power to make the sale has also been destroyed; and the result is the same, whether the judgment was directly satisfied or vacated, as by payment, or an order of court, or indirectly, as by granting a new trial in the action, or by an appeal whose effect is to prevent its execution. *Bullard v. McArdle*, 176.
 4. **EXECUTION OR FORECLOSE SALE BASED UPON A SATISFIED JUDGMENT IS VOID.** *Soukup v. Union Investment Co.*, 817.
 5. **EXECUTION SALES—CAVEAT EMPTOR.**—One who purchases at a sale based upon a writ of execution issued out of a justice's court is affected with notice that an appeal from the judgment has been taken to the superior court, and of all the subsequent proceedings in that court, such as an order vacating the dismissal of the appeal, and recalling the execution issued out of the justice's court after such dismissal. Ignorance on the part of such purchaser that the dismissal has been thus vacated is no defense to a replevin suit brought by the defendant in the original action for the recovery of property sold by the sheriff subsequently to the recall of the execution by the superior court. *Bullard v. McArdle*, 176.
 6. **EXECUTION AGAINST P. R. CRAVENS & Co. IS GOOD AS AGAINST P. R. CRAVENS.**—The addition of the words, "and company," is at most an irregularity, and cannot excuse an officer for his failure to return the writ on or before its return day. *Hawkins v. Taylor*, 82.
 7. **IF AN EXECUTION IS RETURNABLE WITHIN SIXTY DAYS FROM ITS DATE** and the sixtieth day after such date is Sunday, the return must be made on or before the previous Saturday to exempt the officer from a penalty imposed by law in all cases where there is a failure to return a writ on or before the return day thereof. *Hawkins v. Taylor*, 82.
 8. **SUFFICIENCY OF RETURN.**—A return by a sheriff upon an execution against an administrator as follows, "After search and inquiry, I know of no property of the defendant in the county upon which to levy this *f. fa.*," must be construed to mean that such officer can find no property in the hands of the administrator belonging to the estate which he represents, and is a sufficient return of *nulla bona*. The word "defendant," as used in such return, is employed to designate such person in his representative and not in his individual capacity. *Gibson v. Robinson*, 250.
 9. **EXEMPTION OF WAGES.**—The fact that moneys due a debtor for wages have been collected for him by another at his request does not render them, though remaining in the hands of such collector, subject to execution against the person by whom they were earned. *Elliot v. Hall*, 285.
- See ATTACHMENT, 2, 6; CORPORATIONS, 16; JUDGMENTS, 12; TRUSTS, 14.

EXECUTORS AND ADMINISTRATORS.

1. **LACHES IN PROCURING THE ADMINISTRATION OF THE ESTATE OF A DECEDENT** MAY PRECLUDE A CREDITOR from having the real property of an estate sold to pay his debt, as where for more than twelve years after the death of the decedent (five of which were during the late civil war) no application was made for letters of administration, and the heirs had taken possession of the property and finally conveyed it to a third per-

son. Though no statute of limitation is applicable, no unreasonable delay, either in administering or in making a sale after administration is taken, is permitted. What is an unreasonable delay must be determined by the court in its sound discretion in each case. Where it is the policy of the law that seven years should be deemed a sufficient time in which to assert a title to land it ought equally to be regarded as a sufficient time in which a creditor should take such measures as should be necessary to enforce his right to have the real estate of the decedent sold to satisfy his demands. *Roth v. Holland*, 126.

2. PLEADING—EVIDENCE.—When, in an action on an administrator's bond, the declaration sets forth substantially the contents of the bond sued on, and the facts constituting a breach thereof, it is not necessary that a copy of the bond be attached to the declaration in order that the bond itself may be admissible in evidence. *Gibson v. Robinson*, 250.

3. SUITS AGAINST, WHEN NEED NOT BE IN THEIR REPRESENTATIVE CAPACITY.—If an administrator takes possession of property as that of his intestate which another person claims has been given to him by the decedent, such donee may sustain an action against the administrator personally, because if the property did not belong to the decedent at the time of his death it cannot be held by any one as his administrator. *Goulding v. Horbury*, 357.

4. JUDGMENT AGAINST PRINCIPAL—EFFECT OF ON SURETY.—A judgment against an administrator who fails to plead a want of assets in an action upon an alleged debt against his intestate is conclusive upon him of a sufficiency of assets to pay such debt; but in an action against the sureties upon his bond such judgment is *prima facie* evidence only, and they may plead and prove a want of assets in the hands of their principal liable to the payment of such debt. *Gibson v. Robinson*, 250.

EXTRADITION.

1. EXTRADITION BETWEEN THE STATES.—A fugitive from justice surrendered by a state to which he has fled, and returned to the state where he is alleged to have committed the crime for which he is demanded and surrendered, may in the latter state be tried for other offenses than those specified in the requisition, although the offenses were committed before he was demanded. *Commonwealth v. Wright*, 475.

2. A FUGITIVE FROM JUSTICE who has been returned by one state to another under extradition proceedings is subject to trial and conviction in the latter state for a crime committed there before his return, and not mentioned in such proceedings, without first allowing him a reasonable opportunity to return to the state from which he has been surrendered; and it is immaterial that the offense complained of is not a crime in the state from which he is returned. *Lascelles v. State*, 216.

See EXECUTION, 8; INSURANCE, 9-12; SUBROGATION, 6; TRUSTS, 2, 7; WITNESSES, 1.

EXEMPTIONS.

See ATTACHMENT, 2; EXECUTION, 9; FRAUDULENT CONVEYANCES, 6; HOMESTEAD, 4, 5; STATUTES, 2.

EXPERTS.

See COSTS, 1; WITNESSES, 2-5.

FALSE IMPRISONMENT.

1. **FALSE IMPRISONMENT—EVIDENCE.**—In an action to recover for a false arrest and imprisonment, a plain unvarnished account of the arrest published in a newspaper is admissible in evidence as tending to show the publicity given to the fact of the arrest, and the consequent injury to the party arrested. *Filer v. Smith*, 603.
2. **FALSE IMPRISONMENT—EVIDENCE.**—When in an action to recover damages for false imprisonment, the party arrested and a photograph upon the strength of which the arrest was made, are both in court, opinion evidence as to the resemblance between the photograph and such party is not admissible. *Filer v. Smith*, 603.
3. **FALSE IMPRISONMENT—EVIDENCE.**—In an action to recover for a false arrest and imprisonment, advice given by attorneys to the arresting party subsequently to the arrest is not admissible in evidence as a justification, and, even though admissible as bearing upon the question of subsequent detention, it must first appear that such advice was predicated upon a full disclosure of all the facts, an examination of all evidence of justification offered by the party arrested, and a disclosure of whatever suggestions were made by him regarding his identity, before it will be admitted. *Filer v. Smith*, 603.

See **ARREST**, 9.

FELLOW-SERVANTS.

See **RAILROADS**, 19-22.

FIDUCIARY.

See **ACCOUNTING**.

FINES.

See **MUNICIPAL CORPORATIONS**, 5, 8, 9.

FIRES.

See **RAILROADS**, 23-27.

FLOODS.

See **RAILROADS**, 4, 5; **REAL PROPERTY**, 2; **WATERS**, 6.

FORECLOSURE.

See **ASSIGNMENT**, 2; **EXECUTION**, 1, 4; **TRUSTS**, 14.

FOREMAN.

See **MASTER AND SERVANT**, 2, 3.

FORGERY.

1. **INDICTMENT FOR FORGERY—JOINDER OF AND ELECTION BETWEEN COUNTS.** Several counts, each charging forgery, one by fraudulently and falsely making a bill of exchange in a fictitious name, another by fraudulently obtaining money by use of the same bill drawn in a fictitious name, another for fraudulently obtaining money by color of the same bill, and another for fraudulently and falsely uttering the same bill, the last two counts not alleging the bill to be drawn in a fictitious name, may be joined in the same indictment, and on the trial the prosecution is not

bound to elect on which particular count or counts it will rely for a conviction. *Lascelles v. State*, 216.

2. **EVIDENCE—REPRESENTATIONS.**—Statements by one accused of forgery calculated to create an impression that he is a person of respectability and wealth, made to persons defrauded by the forgery, and also to another who was the medium of introduction between them, are admissible in evidence as tending to show guilt when accompanied with facts and circumstances indicating such representations to be false; and the fact that the accused pretended to write to his father for a large sum of money, and mailed an envelope to such person, which, being returned unopened in due course of mail, was found to contain nothing but a blank piece of paper, is also admissible in evidence, together with such envelope and its contents. *Lascelles v. State*, 216.
3. **ASSUMPTION OF FICTITIOUS NAME AND RELATIONSHIP.**—When one fictionally assumes the name of another, together with the relationship of son to that other, and in that name draws and passes a bill of exchange for value to one who relies upon such assumptions, the drawer of the bill is guilty of forgery. *Lascelles v. State*, 216.
4. **ASSUMPTION OF FICTITIOUS NAME AND CHARACTER.**—Although one has been accustomed to use a certain assumed name, yet when he gives such name a fictitious character, which is calculated and intended to deceive, by imparting an apparent value to a bill of exchange signed by him in such name, which might not otherwise attach to it in the minds of the person with whom he is dealing, and he thus obtains money from such person, he is guilty of forgery. *Lascelles v. State*, 216.

FRANCHISES.

See CORPORATIONS, 27: COURTS, 1.

FRAUD.

1. **CONSIDERATION WHICH WILL SUPPORT A SALE OF PROPERTY** so as to cut off the rights of one from whom the seller acquired it by fraud must be something more than the discharge of a debt that revives when the consideration for its discharge fails. *Hurd v. Bickford*, 353.
2. **PROPERTY PROCURED BY PURCHASE OF, IN PAYMENT OF AN ANTECEDENT DEBT.**—If property is procured by fraud, the owner is not precluded from recovering it from one to whom it has been sold, if the latter made payment therefor with indebtedness due to him from his immediate vendor. *Hurd v. Bickford*, 353.

See ACCOUNTING; ALTERATION OF INSTRUMENTS; BAILMENT, 1, 2; CONTRACTS, 9; CORPORATIONS, 11; EXECUTION, 1; FORGERY; FRAUDULENT CONVEYANCES, 1; PUBLIC LANDS; SALES, 3; WILLS, 8, 14, 17, 21.

FRAUDULENT CONVEYANCES.

1. **A VOLUNTARY CONVEYANCE IS PRESUMED TO BE FRAUDULENT AND VOID AS AGAINST EXISTING CREDITORS.**—If the grantor is at the time insolvent and unable to pay his debts the presumption is conclusive. *Rudy v. Austin*, 85.
2. **A VOLUNTARY CONVEYANCE IS NOT, AS AGAINST SUBSEQUENT CREDITORS, FRAUDULENT NOR VOID,** though the grantor was indebted at the time it was executed. To make it fraudulent, proof of actual or intentional fraud is required. *Rudy v. Austin*, 85.

2. **A VOLUNTARY CONVEYANCE IS FRAUDULENT AND VOID AS AGAINST SUBSEQUENT CREDITORS IF THE GRANTOR WAS INSOLVENT** when it was made and was then engaged in a business in which it was necessary for him each year to devote its proceeds to the payment of antecedent indebtedness, and to obtain additional credit for current expenditures. *Rudy v. Austin*, 85.
 4. **IF THE MAKER OF A VOLUNTARY CONVEYANCE IS INSOLVENT** at the time, he is presumed to have had a fraudulent intent as to subsequent as well as to existing creditors, especially if he contracts debts immediately or so soon thereafter as to show that he reasonably had in contemplation the contracting of such debts at the time the transfer was made. *Rudy v. Austin*, 85.
 5. **FRAUDULENT CONVEYANCE OF PART ONLY OF DEBTOR'S LANDS.**—If an insolvent judgment debtor conveys lands to his brother, who transfers them to the debtor's wife, the transactions being really a gift to the wife in fraud of existing creditors, the fact that the debtor has an interest in other lands, upon which the same judgment is a lien, is no defense to an action by the judgment creditor to set aside the conveyance and to subject the property to the lien of his judgment. *Patton v. Bragg*, 730.
 6. **IF MONEY IS EXEMPT AS WAGES** no disposition of it by its owner can operate as a fraud upon his creditors. *Elliot v. Hall*, 285.
 7. **INDIRECT GIFT BY DEBTOR TO HIS WIFE.**—If an insolvent judgment debtor conveyed all his interest in his father's estate to his brother, who immediately afterwards conveyed some of the same lands to the debtor's wife, the court, in the absence of any pleading or evidence to show that the wife paid for the land out of her own means, may reasonably find that the property thus acquired was paid for with the means of the husband, and, such a fact being found, the transaction, though no proof of actual fraud is given, must be pronounced fraudulent in law as to existing creditors. *Patton v. Bragg*, 730.
 8. **VOLUNTARY CONVEYANCE—WHO MAY ATTACK.**—If the maker of a voluntary conveyance was insolvent when it was executed, but paid his debts then existing by creating others, the holders of these later debts become subrogated to the rights of the creditors existing when the conveyance was made, and are therefore entitled to assail the voluntary conveyance as a fraud upon them. *Rudy v. Austin*, 85.
- See ASSIGNMENT FOR BENEFIT OF CREDITORS**, 8-14; **CORPORATIONS** 15, 16; **JUDGMENTS**, 10; **TRUSTS**, 10.

FUGITIVES.

See EXTRADITION.

GARNISHMENT.

See ATTACHMENT, 2-5.

GAS COMPANIES.

See CORPORATIONS, 27.

GIFTS.

1. **CAUSA MORTIS.**—If, while awaiting and expecting death, the owner of stocks, bonds, and bank books at that time in a cupboard in the room takes two wallets out of his pockets and also the key of the cupboard,

and giving the key and wallets to his illegitimate daughter says to her, "Jane, take these and take the key of this cupboard; it is thine, and all that is in the cupboard is thine," and she thereupon takes them and takes all the bonds and bank books and looks them over and puts them back again and locks the cupboard and puts the key and the wallets in her pocket and retains both until after her father's death, this is a good gift *causa mortis*, especially if it appears certain from the whole evidence that he intended to bestow his estate on his daughter and died in the belief that he had done so. *Goulding v. Horbury*, 357.

2. GIFT OF MONEY ON DEPOSIT.—A writing given by a bank to a depositor acknowledging the receipt of four bonds and a certain amount of money in coupons and stating that the former are to be sold and the latter collected and the proceeds placed to the credit of the depositor, is in fact a certificate of deposit, and an indorsement thereon by the depositor addressed to the bank to "please let my nephew have the amount of the within bill," coupled with its delivery so indorsed to such nephew with the intention of giving him the fund in bank operates as a valid gift thereof and justifies the bank in paying it to such donee upon presentation of the writing. *Crook v. First Nat. Bank*, 17.

See CHARITIES; FRAUDULENT CONVEYANCES, 5, 7; HUSBAND AND WIFE, 4; LEGISLATURE, 4; WITNESSES.

GRAND JURY.

See INDICTMENT.

GUARANTY.

See CONTRACTS, 2.

GUARDIAN AND WARD.

See JUDGMENTS, 11.

GUESTS.

See INNKEEPERS, 2, 3.

HABEAS CORPUS.

VOID JUDGMENT.—If from the record it appears that the defendant was convicted by a jury of eleven persons only, the verdict and judgment must be treated as void on *habeas corpus*. This result cannot be avoided by extrinsic evidence to the effect that there were in fact twelve jurors, and the name of one of them was omitted from the record through a clerical error. *Scott v. State*, 642.

See COURTS, 1.

HEIRS.

See INSURANCE, 13; WILLS, 24, 25.

HEREDITAMENTS.

See EMINENT DOMAIN; TAXES, 1.

HIGHWAYS.

HIGHWAYS, FOR WHAT PURPOSES MAY BE USED—NEW SERVITUDE.—A public street may be applied to all purposes which are not subversive of
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its proper use, nor inconsistent with the uses contemplated in its dedication, grant, or condemnation. An abutting owner can complain only when the street is subjected to a new servitude, inconsistent with and subversive of its use as a street. *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 706.

See NEGLIGENCE, 1, 2, 5; RAILROADS, 1-3; REAL PROPERTY, 2.

HOMESTEAD.

1. AN ORDER OF A PROBATE COURT DIRECTING THE SALE OF THE HOMESTEAD OF A DECEDENT IS VOID if made during the minority of his children, or while his widow is unmarried and has not abandoned the homestead, nor acquired any other in her own right. *Bond v. Montgomery*, 119.
2. HUSBAND AND WIFE.—CONVEYANCE OF INTEREST IN HOMESTEAD EXECUTED BY HUSBAND ALONE is invalid for any purpose, and therefore cannot have the effect of passing to the grantee an estate in reversion, to take effect upon and after a proper sale of the homestead by the husband and wife jointly. *McKenzie v. Shows*, 654.
3. FATHER'S RIGHT TO ALIENATE BY WILL.—A father cannot, by will, deprive his minor children of their homestead rights in property occupied by them as a homestead at the time of his death. *Kleimann v. Giesemann*, 761.
4. THE PROCEEDS OF A VOLUNTARY SALE of a homestead are not exempt from execution until they are invested in another homestead, nor is land purchased with such profits and intended for occupancy as a homestead, but upon which the debtor does not reside and with respect to which he has not filed any declaration of homestead. *Wright v. Westheimer*, 268.
5. A HOMESTEAD PURCHASED WITH THE PROCEEDS OF A SALE OF ANOTHER HOMESTEAD is not exempt from attachment levied thereon prior to the filing of a declaration of homestead. *Wright v. Westheimer*, 269.

See ALTERATION OF INSTRUMENTS.

HOMICIDE.

1. EVIDENCE OF BAD CHARACTER OF DECEASED is admissible in trials for murder only when it is shown, *prima facie*, that the accused had been assailed, and was honestly seeking to defend himself at the time when the crime was committed. *Gardner v. State*, 202.
2. EVIDENCE OF BAD CHARACTER OF DECEASED, when not admissible, either to justify or mitigate a homicide, is not admissible for the purpose of grading the crime, or fixing the punishment. *Gardner v. State*, 202.
3. EVIDENCE OF BAD CHARACTER OF DECEASED.—When, on a trial for murder, it appears that the accused, when the homicide was committed, was not endeavoring to defend himself, but was making and following up an attack which was altogether unnecessary for the immediate protection of his life or person, and there was nothing to reduce the homicide to any grade of manslaughter, or to justify it, evidence of the violent and desperate character of the deceased is not admissible. Such evidence is only admissible to throw light upon the guilt or innocence of the accused, and for the purpose of properly grading his crime. *Gardner v. State*, 202.
4. THREATS—EFFECT OF EVIDENCE OF BAD CHARACTER OF DECEASED.—Although within a few hours before the time of the homicide the deceased threatened to take the prisoner's life, of which threat the prisoner

had knowledge, and although only a few moments before he was slain the deceased was in the public street armed with a pistol, and approaching the prisoner with the probable purpose of executing his threats, yet if, while he was struggling with another person who had arrested him and was endeavoring to take the pistol away from him, the prisoner, seeing the struggle in progress, voluntarily ran up and shot the deceased whilst the latter was engaged with the third person, and not in a situation to make any direct attack upon the prisoner, and if, after being wounded, the deceased abandoned his pistol and fled from the street into a house, and the prisoner pursued him and in the house inflicted the mortal wound by shooting again without any apparent necessity, the bad character of the deceased for violence would afford no substantial aid to the jury in deciding whether the prisoner acted from malice, or from a *bona fide* motive of self-preservation; and for this reason evidence of such bad character is not admissible. *Gardner v. State*, 202.

5. **OPINION AS EVIDENCE.**—On a trial for murder the opinion of a witness as to what the deceased intended to do with a pistol for the possession of which he was struggling with a third person prior to the killing is not admissible in evidence. *Gardner v. State*, 202.
6. **ROBBERY.—RIGHT TO KILL IN DEFENDING AGAINST** a robbery does not end as soon as there is such change of possession of the property taken as will render the crime technically complete. Such right remains with the owner so long as his property is in his immediate presence, and the killing of the robber will prevent it from being carried away. *Crawford v. State*, 242.
7. **RIGHT TO RESIST TRESPASS.**—Section 4332 of the Georgia code, declaring that “if after persuasion, remonstrance, or other gentle means used, a forcible attack and invasion on the property or habitation of another cannot be prevented it shall be justifiable homicide to kill the person so forcibly attacking and invading,” has no application when the property attacked or invaded is so inconsiderable that the injury intended is not serious, but slight, and does not involve a felony, such as the severing from a side of meat a small portion thereof. *Crawford v. State*, 242.
8. **MANSLAUGHTER—RESISTING TRESPASS.**—Although a trespass, not amounting to a felony, will not justify murder, and is not of itself sufficient to reduce a homicide to manslaughter, yet if the circumstances show that the killing was the result of a sudden, violent impulse of passion, provoked by the trespass, especially if accompanied by an assault with a deadly weapon, and acted upon before the passion has time to cool, this is such provocation as will operate to reduce the crime to manslaughter. *Crawford v. State*, 242.
9. **INSTRUCTIONS AS TO MANSLAUGHTER.**—When, on a trial for murder, there is nothing in the evidence to fairly raise the question as to whether or not the crime committed is manslaughter, the court need not charge the jury on that degree of homicide. *Gardner v. State*, 202.

HOTELS.

See INNKEEPERS.

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1. **IF A WIFE PLACES IN HER HUSBAND'S HANDS MONEY** which is her separate property, the presumption is that he receives it as his

own, in the absence of any evidence that he received it in trust for her. Hence if she loans her husband a bond, payable to bearer, and receives from him, or from a firm of which he is a member, a promissory note for the amount of the bond, there is nothing to indicate that he received it in trust for her, or that he is not at liberty to use it as his own. *Clark v. Patterson*, 498.

2. **AGENCY OF HUSBAND FOR WIFE.**—Where the bill to foreclose a trust-deed on a homestead, the effect of which the wife seeks to avoid on the ground of a material alteration made therein by her husband after its execution, avers that the whole transaction was between the complainant and the husband of the defendant, “except that the defendant executed the papers after they were prepared,” etc., this exception is entirely inconsistent with any inference that the husband was the agent of his wife in regard to the final act of making the conveyance contemplated in the preliminary negotiations. *Foot v. Hambrick*, 631.
3. **MARRIED WOMEN—A HUSBAND MAY BECOME THE AGENT OF HIS WIFE TO MAKE A CONTRACT FOR HER FOR THE IMPROVEMENT** of her real property, but his authority to so act is not implied from the marital relation, nor from the mere fact that he occupied, or managed and controlled, her real estate. *Hoffman v. McFadden*, 101.
4. **CONVEYANCE OF WIFE'S SEPARATE PROPERTY TO HUSBAND.**—The enactment of the California statute of 1850 defining the rights of married women with respect to their separate property removed the common-law impediment to a voluntary conveyance from the husband to the wife, but left unaffected the husband's incapacity to take by deed of gift directly from his wife. *Rico v. Brandenstein*, 192.
5. **HUSBAND CANNOT BE MADE TRUSTEE OF WIFE'S SEPARATE PROPERTY BY CONVEYANCE FROM HER** by virtue of a statute which merely provides that a wife may convey her real estate by a deed executed by herself and her husband. A trust is valid only to the extent of the legal capacity of the person creating it, and if the wife cannot lawfully convey her separate property directly to her husband no title vests in him under a deed which purports to transfer such separate property to him to be held in trust for the benefit of his and her children. *Rico v. Brandenstein*, 192.
6. **HUSBAND AND WIFE, EFFECT OF CONVEYANCE TO—AGREEMENT FOR SALE OF COMMUNITY PROPERTY.**—By a conveyance of land to husband and wife in the name of both the spouses, each of them becomes the holder of the legal title to one-half the land; and if, pending an action between them for divorce, they enter into an agreement by which, among other matters, it is provided that such land shall be sold for a price which, with certain limitations as to a minimum, is to be such as, in the judgment of a designated referee, represents its fair value, this agreement cannot be construed as conveying to the husband all the wife's interest in the land, leaving her merely the right to enforce the payment by him of one-half the proceeds, but must be regarded both as a recognition by him that the land is community property, and as a mutual executory agreement by both parties that they will consent to the sale of the land on the terms specified, and that, after such sale, each will accept one-half of the proceeds. Such executory agreement is broken if the husband refuses to convey the land to a purchaser who offers a price deemed by the referee to be adequate, and such a breach will give the wife a right either to treat the agreement as rescinded, and bring suit for partition

of the land, or to treat it as existing, and seek its enforcement against the husband. *Biggi v. Biggi*, 141.

7. **A MARRIED WOMAN CANNOT BECOME A PARTNER WITH HER HUSBAND** in a mercantile business though the statute declares that a married woman may bargain, sell, and transfer her personal property, and carry on any trade or business on her sole and separate account, and that her earnings from her trade, business, labor, or services shall be her sole and separate property and may be invested by her in her own name, and she may alone sue and be sued in the courts of the state on account of such property, business and services. *Gilbertson-Sloss Commission Co. v. Salinger*, 105.

8. **MARRIED WOMEN—POWER TO CONTRACT AS TO AFTER-ACQUIRED TITLE.** When the statute confers upon a married woman power only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract or in consideration of it, she has no power to contract with a third person to bind an estate subsequently acquired by her through the death of her husband. *Naylor v. Minock*, 595.

9. **ACQUIESCENCE, KNOWLEDGE IS ESSENTIAL TO.**—If a wife seeks to avoid a deed of trust on her homestead on the ground that it had been corrected by her husband after its execution, and the bill asking for foreclosure of the deed avers that she "was either informed of the correction and acquiesced therein, or never had any information that any mistake had been made," etc., the alternative statement negatives the idea of acquiescence on the wife's part; nor is such acquiescence shown by a letter written subsequently to the alteration, in which she admitted that the deed of trust embraced her homestead, and that the complainant could lawfully proceed to have it sold, such an admission being entirely consistent with the assumption that she knew nothing about the alteration. *Foots v. Hambrick*, 631.

10. **MARRIED WOMAN'S WILL—REVOCATION AND POWER TO MAKE.**—Statutes which clothe a married woman with full and absolute testamentary power over her own property, no matter how acquired, and give to her husband no authority to restrict her exercise of it, place her, so far as her capacity to make a will is concerned, upon the same footing as a *feme sole*. Under such legislation her common law disabilities are removed and her marriage does not revoke her will previously made, but she may revoke it at any time, and by another will dispose of her own property against the wishes of her husband, and even to his entire exclusion. *Roane v. Hollingshead*, 438.

11. **A MARRIED WOMAN AND HER SEPARATE ESTATE ARE BOUND BY HER INDORSEMENT** on a promissory note to a third person when such note purports to be payable to her order, though it was given for a pre-existing debt of her husband, if it was made pursuant to an agreement between the indorsee and the husband that if the note should be paid it should be in settlement of all claims between the parties. The implied promise not to sue on the note against the husband until the maturity of the note, nor afterwards, if it should be paid when due, is a valuable consideration, sufficient to support the promise of the wife implied from her indorsement. *Robertson v. Rowell*, 466.

12. **MORTGAGE BY TENANT IN ENTIRETY.**—A mortgage given by a wife upon land owned by herself and her husband as tenants by entirety to secure to their son the repayment of advances made by him in the defense of

his father on a criminal charge, and in maintaining him at an insane asylum, is void, and will neither bind her present interest in the land nor any interest therein acquired by her by the subsequent death of her husband. *Naylor v. Minock*, 595.

12. **TENANTS BY ENTIRETY—HUSBAND AND WIFE—CONVEYANCE BY WIFE ALONE.**—Neither a husband nor a wife can mortgage nor convey an estate vested in them as tenants in the entirety, unless both of them join in the instrument, and every instrument by which either attempts alone to make such conveyance is void. *Naylor v. Minock*, 595.

See ALTERATION OF INSTRUMENTS, 2; ARREST, 1; CORPORATIONS, 13; FRAUDULENT CONVEYANCES, 5, 7; HOMESTEAD, 2; INSURANCE, 17; PARTITION, 5; PARTNERSHIP, 1; REAL PROPERTY, 1.

HYDRANTS.

See TAXES.

IMPRISONMENT.

See ARREST.

IMPROVEMENTS.

See JUDGMENTS, 6; MECHANICS' LIENS, 1, 3, 6; TAXES, 2.

INDEMNITY.

See SURETYSHIP, 1, 2.

INDICTMENT.

1. **IMPROPER INFLUENCE TO PROCURE.**—Grand jurors should be permitted to act without bringing any undue influence to bear upon them. If an attorney of the party claiming to be injured by an alleged crime goes before the grand jury as a prosecutor, for the purpose of securing an indictment, the indictment, if secured, must be set aside on a plea in abatement thereto. *Wilson v. State*, 664.
2. **GRAND JURORS—OBJECTIONS TO QUALIFICATIONS OF, HOW TAKEN.**—The only objections which can be taken to grand jurors by plea in abatement to the indictment must be such as would disqualify the juror to serve in any case, and all other objections affecting the competency of the juror must be taken by challenge before the indictment is found, and will not be heard after the time for challenging is past. *Lascelles v. State*, 216.
3. **GRAND JUROR, DISQUALIFICATION OF.—PLEA IN ABATEMENT OR MOTION TO QUASH** an indictment upon the ground that a member of the grand jury that found the indictment was related by affinity to the prosecutor within the fourth degree, is not sustainable, at least when the accused has had an opportunity to make the question by challenge before the finding of the indictment. *Lascelles v. State*, 216.

See FORGERY, 1; JUDGMENTS, 13.

INDORSEMENT.

See GIFTS, 2; HUSBAND AND WIFE, 11; NEGOTIABLE INSTRUMENTS, 2, 4, 6, 9, 11; PARTNERSHIP, 2.

INFANTS.

See CONFLICT OF LAWS; JUDGMENTS, 11; MASTER AND SERVANT, 1, 2; PARENT AND CHILD; REPLEVIN, 1.

INJUNCTION.

- 1. INJUNCTION WILL NOT ISSUE TO RESTRAIN CRIMINAL PROCEEDINGS** unless they are instituted by a party to a suit already pending before the court, and for the purpose of trying the same right that is in issue there. *Orighton v. Dahmer*, 666.
 - 2. AN INJURY IS IRREPARABLE** so as to justify an injunction against its continuance if it is one for which there can be no adequate compensation in money, or which, if continued, may become the foundation of adverse rights, or occasion a multiplicity of suits, or materially lessen the enjoyment of property by its owner. *Tros v. Larson*, 336.
 - 3. WATERCOURSES—DIVERSION FOR DRAINAGE—INJUNCTION.**—An upper proprietor through whose land a stream of water flows will be enjoined from cutting a ditch on such land for the purpose of straightening the course of the stream and protecting his land from overflow, although he returns all the water to its natural channel before it leaves his land, when the effect of such ditch is to divert the water from its natural course, and to so increase the current of the stream as discharged upon the land of the lower proprietor as to seriously and materially injure his milldam by washing out its banks and filling it with mud. *Kay v. Kirk*, 408.
 - 4. MANDATORY INJUNCTION MAY ISSUE TO COMPEL DEFENDANTS TO REMOVE A DAM** erected by them across the outlet of a lake whereby the natural flow of the waters from the lake are retarded and the land of the complainant overflowed, though such dam was constructed several years before the commencement of the suit and the defendants have since done nothing towards its maintenance or repair, nor asserted any right to maintain it, nor are they the owners of the land on which it is situated. If the dam was built with the knowledge and assent of the owner of the land, and he is not shown to have any interest that will be subserved by its continuance, the court will assume that he will permit the defendants to remove it. *Tros v. Larson*, 336.
 - 5. MANDATORY INJUNCTION** may issue to compel the removal of obstructions placed in a ditch so as to retard the flow of the water as it was before such obstructions were built. *Wharton v. Stevens*, 297.
- See CORPORATIONS, 25; COURTS, 1, 3, 4; JUDGMENTS, 9.**

INNKEEPERS.

- 1. In an action brought by the inmate of a hotel to recover the value of certain personal property destroyed by the burning of such hotel, the question whether the plaintiff was a guest or a boarder is an issue in the case, upon which the liability of the defendant depends, and upon which the court should make an express finding.** *Magee v. Pacific Imp. Co.*, 199.
- 2. WHETHER AN INMATE OF A HOTEL IS A GUEST OR A BOARDER** is a question of fact to be determined by the trial court upon all the evidence before it. That the plaintiff made a special arrangement respecting his sojourn is not conclusive of the question, but merely a circumstance to be considered in connection with all the evidence from which the ultimate fact is to be decided. *Magee v. Pacific Imp. Co.*, 199.

2. **SPECIAL ARRANGEMENT WITH INNKEEPER** is not established merely by proving that there was a rule of the house to charge an inmate a less rate *per diem* for entertainment by the week than by the day, and that, if a guest remained more than a week, he got the benefit of the rule, no evidence being offered that the rule was ever brought to the knowledge of the inmate, or that he was ever informed of the rates charged under different circumstances, or that there was at any time something said or done with reference to the period over which the sojourn was to extend. *Magee v. Pacific Imp. Co.*, 199.

• See CORPORATIONS, 24.

INSANE PERSONS.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2, 3; MUNICIPAL CORPORATIONS, 10-13; STATUTES, 11; WILLS, 13.

INSOLVENCY.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CORPORATIONS, 17; FRAUDULENT CONVEYANCES, 1, 3, 4, 8; JUDGMENTS, 9; PARTNERSHIP, 2; TRUSTS, 7-9, 12.

INSTRUCTIONS.

See DAMAGES, 4; HOMICIDE, 9; NEW TRIAL, 3; RAILROADS, 7, 8, 27; SALES, 2; TRIAL, 2.

INSURANCE.

1. **INSURANCE AGAINST FIRE, LOSS COVERED BY.**—Insurance against loss by fire includes loss where the cause insured against was the means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it or set it in motion, if the original effective cause was not itself made a subject of separate insurance in the contract between the parties. *Lynn Gas etc. Co. v. Meriden etc. Ins. Co.*, 540.
2. **INSURANCE AGAINST FIRE, WHEN INCLUDES A LOSS ARISING FROM ELECTRICITY.**—If insurance is effected on a building and machinery used for generating electricity, and thereafter a fire occurs in the building which is speedily extinguished, but as a result of the fire, in a part of the building remote therefrom, what is known as a "short circuit" was produced, from which machinery was greatly damaged, this is a damage by fire within the meaning of the policy. The fire was a direct and proximate cause of the damage according to the meaning of the words, "direct and proximate cause," as interpreted by the best authorities. *Lynn Gas etc. Co. v. Meriden etc. Ins. Co.*, 540.
3. **INCREASE OF RISK FOR WHICH THE ASSURED IS RESPONSIBLE.**—If the property insured is a church and it is being repainted under the direction of the board of trustees by painters employed by them, and they have knowledge of the means used by such painters, and those means amount to an increase of the risk, such increase must be regarded as taking place with the knowledge and consent of the assured and as being an alteration of the circumstances affecting the risk. *First Congregational Church v. Holyoke etc. Ins. Co.*, 508.
4. **CONDITION IN A POLICY AGAINST KEEPING OR USING NAPHTHA** by the assured on the premises implies the use of the premises as a place of deposit for the prohibited article for a considerable time. But if naph-

the is used in a torch for nearly a month for the purpose of burning off old paint, though the naphtha is not on or in the premises, but is used in a liquid form a few inches outside the wall, then this is a prohibited use of naphtha on the premises within the meaning of the policy. *First Congregational Church v. Holyoke etc. Ins. Co.*, 508.

6. INCREASE OF RISK.—THE USE OF A NAPHTHA TORCH TO BURN OFF THE OLD PAINT from a wooden building for the purpose of repainting it, when such use continues every working day for nearly a month, violates a condition in a policy of insurance providing that it shall become void if the situation and circumstances of the risk shall be so altered as to cause an increase thereof. *First Congregational Church v. Holyoke etc. Ins. Co.*, 508.
9. INCREASE OF RISK, DURATION OF.—A condition in a policy of insurance that it shall become void if the situation or circumstances affecting the risk shall be so altered as to cause an increase thereof, is not ordinarily violated by a mere temporary change increasing the risk, but a change existing continuously during the working hours of nearly a month is not temporary, and is continued sufficiently long to be deemed a change in the situation and circumstances affecting the risk. *First Congregational Church v. Holyoke etc. Ins. Co.*, 508.
7. INCREASE OF RISK FOR THE PURPOSE OF MAKING REPAIRS.—A condition in a policy of insurance against any change in the situation and circumstances of property affecting the risk is not intended to prevent the making of necessary repairs and the use of such means as are reasonably necessary for that purpose. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in proper condition by making repairs upon it. *First Congregational Church v. Holyoke etc. Ins. Co.*, 508.
8. INCREASE OF RISK WHEN A QUESTION FOR THE JURY.—If a policy of insurance against fire contains a condition against increasing the risk and against the use of naphtha on the premises, and such premises being in need of repainting, a naphtha torch is used daily for a period of a month for the purpose of burning off old paint, whereby the risk insured against is increased, the question to be submitted to the jury is whether the use of the naphtha, at the time and in the manner in which it was used, was reasonable and proper in the repair of the building, having reference to the danger from fire as well as other considerations. If the use of the naphtha torch was, under the circumstances and at the time and in the manner in which it was used, an unreasonable use the policy is avoided thereby. *First Congregational Church v. Holyoke etc. Ins. Co.*, 508.
9. BENEFIT SOCIETIES—WHETHER INSURANCE COMPANIES.—An association not organized to do business for profit or gain, but to pecuniarily aid the widows, orphans, heirs, and devisees of its members, is not an insurance company, and its membership certificates are not contracts of insurance. *Northwestern etc. Aid Assn. v. Jones*, 810.
10. BENEFICIAL ASSOCIATIONS—DISTRIBUTION OF MEMBERSHIP FUND.—When a certificate of membership in a benefit society provides that by reason of membership the devisees, or, in case of no will, the heirs, of the member upon his death are to receive a designated sum, and a member holding such certificate dies without children, leaving a will by which he appoints an executor, but without making any bequest of his benefit fund, such fund will be distributed to his legal heirs as designated by

the statute of distributions to the exclusion of such executor and the creditors of the estate of the deceased. *Northwestern etc. Aid Assn. v. Jones*, 810.

11. **BENEFIT ASSOCIATIONS—CONFLICT OF LAWS—DISTRIBUTION OF BENEFIT FUND.**—When a member of a benefit society organized under the laws of one state and domiciled therein receives its certificate of membership providing that his devisees, or, in case of no will, his heirs, are to receive a designated sum upon his death, and then dies while domiciled in another state without making a will, the fund to which his heirs are entitled must be distributed to them as provided by the intestate laws of the latter state, unaffected by the laws of the state of the domicile of such society. *Northwestern etc. Aid Assn. v. Jones*, 810.
 12. **BENEFIT SOCIETIES—BENEFIT FUND—MEMBER'S INTEREST IN.**—Under a certificate of membership in a benefit society which provides that the devisees, or, in case of no will, the heirs, of the member upon his death are to receive a designated sum, the member has no property in the fund during his life. He has only a power of appointment by will. In case of his death without the exercise of such power of appointment, except to name his executor, neither the latter nor the deceased's creditors can acquire any interest in the benefit fund. It must be distributed to his heirs under the intestate law. *Northwestern etc. Aid Assn. v. Jones*, 810.
 13. **INSURABLE INTEREST—WHO MAY BE BENEFICIARIES.**—A person has such an insurable interest in his own life that he may insure it for the benefit of his heirs, or even for the benefit of a stranger. *Northwestern etc. Aid Assn. v. Jones*, 810.
 14. **WAGERING CONTRACT.**—A man may insure his own life, paying the premium himself, for the benefit of another, who has no insurable interest. Such transaction is not a wagering contract. *Hill v. United Life Ins. Assn.*, 807.
 15. **BENEFIT SOCIETIES—WAGERING CONTRACT.**—A certificate of membership in a benefit society which provides that the devisees, or, in case of no will, the heirs, of the member upon his death are to receive a designated sum, is not a wagering contract. *Northwestern etc. Aid Assn. v. Jones*, 810.
 16. **TONTINE ASSIGNMENT—PAYMENT TO FIDUCIAL AGENCY.**—When a number of members of a life insurance association, each holding a policy in like amount, execute tontine assignments to a fiducial agency in trust to collect and distribute the proceeds of their respective policies, in case of death, to the survivors, such assignments are not wagering contracts but are valid. Upon the death of one of the assignors the payment of his insurance to such fiducial agency is a good payment and relieves the insurer of all liability to the legal representatives of the insured. The right of such representative to recover the insurance money in an action against the fiducial agency, not being before the court, is not decided. *Hill v. United Life Ins. Assn.*, 807.
 17. **INSURANCE ON LIFE OF HUSBAND, PAYABLE TO HIS WIFE**, should be considered as payable to her only in the event of her surviving him. On her death in his lifetime, a resulting trust arises in favor of his estate. This rule is equally applicable to a certificate by a mutual aid society of which the husband was a member, and the assessments of which were paid by him. *Haskins v. Kendall*, 490.
- See **ARBITRATION**, 4; **COTENANCY**; **NEGOTIABLE INSTRUMENTS**, 1; **TRUSTS**, 2; **WITNESSES**, 2.

INTERLINEATIONS.

See WILLS, 23.

JOINT TENANCY

See COTENANCY, 10.

JUDGMENTS.

1. **A JUDGMENT IS RENDERED** when ordered by the court, but is not entered until actually written in the judgment book. *Durant v. Comegys*, 267.
2. **FINAL, WHAT IS NOT.**—The words, “at this day the court ordered this cause dismissed, at plaintiff’s costs, taxed at three dollars and forty cents,” do not constitute a final judgment, but merely an order directing the entry of a judgment of dismissal. *Durant v. Comegys*, 267.
3. **FINDINGS OF JURISDICTION HOW FAR CONCLUSIVE.**—As long as the judgment of a competent court, deciding that it has jurisdiction of a suit against a nonresident, stands unreversed, the defendant is precluded from pleading to the jurisdiction in any other court to which the suit may be removed. *Baisley v. Baisley*, 726.
4. **JUDGMENT NULLIFYING DEED—CONCLUSIVENESS.**—A judgment of a court of competent jurisdiction setting aside and nullifying a conveyance of land and establishing the relation of the parties to each other, is conclusive upon them, and they are thereby estopped from subsequently asserting any title or claim of title to the premises in question under such conveyance, or denying their relation to each other as thus established. *Stewart v. Stewart*, 67.
5. **JUDGMENT NULLIFYING DEED AND ESTABLISHING COTENANCY—EFFECT OF.** A judgment against a person in possession of land declaring the deed under which he holds to be void and that he is a tenant in common with the other parties to the suit, interrupts and destroys any adverse possession he may have had against his cotenants and restores the seisin to all of them, and the subsequent silent possession of such person claiming under the same deed accompanied by no act amounting to an ouster, will not constitute such adverse possession against the other cotenants, as will vest title by the statute of limitations. *Stewart v. Stewart*, 67.
6. **JUDGMENT NULLIFYING DEED AND ESTABLISHING COTENANCY—IMPROVEMENTS BY COTENANT—LACHES.**—When after the rendition of judgment against a party in possession of land declaring the deed under which he holds to be void, and that the parties to the suit are tenants in common, such party continues in possession, but without claiming to hold adversely to his cotenants except by virtue of such deed, his possession is not adverse, and if he places improvements on the land he does so at his risk, without any right to maintain that his cotenants are guilty of laches in allowing him to erect such improvements. *Stewart v. Stewart*, 67.
7. **EXISTENCE AND CONTENTS OF JUDGMENT RELIED UPON AS ESTOPPEL MAY BE PROVED** by producing a certified copy of the judgment entry of a court of record possessing general original jurisdiction, and such copy is *prima facie* evidence of a valid judgment, but it is not conclusive either of the jurisdiction of the parties, service or of any other matter material to the rendition of a valid judgment. If the party against whom it is offered can derive any benefit from proving the antecedent or subsequent proceedings, or the want of any legal essential, he is at liberty to introduce the entire record. *Gibson v. Robinson*, 250.

8. **HOW PROVED.**—When a judgment is relied on as an estoppel or as establishing any particular state of facts of which it is the judicial result, it can be proved only by offering in evidence a complete and duly authenticated copy of the entire proceedings in which the judgment was rendered; but when the only direct object to be subserved is to show the existence and contents of such judgment, a certified copy of the judgment of a court of record possessing general original jurisdiction is admissible by itself to prove its rendition and contents, and when admitted in evidence all legal incidents attach which the law annexes to judgments of that class. *Gibson v. Robinson*, 250.
9. **JUDGMENTS RESTING UPON UNAUTHORIZED APPEARANCE OF ATTORNEYS WILL BE SET ASIDE** upon motion. Equity will enjoin the collection of a judgment so procured, when the right to move to set it aside has been lost, regardless of the solvency or insolvency of the attorney. *Corbitt v. Timmerman*, 586.
10. **JUDGMENT BASED ON APPEARANCE OF ATTORNEY—COLLATERAL ATTACK.** When, after process is served on one of two defendants who is an attorney, he appears for both, and judgment is rendered against them, after which the defendant not served fraudulently conveys all of his property subject to execution, he cannot, in an action brought to set aside such conveyance, attack the judgment on the ground of nonservice of process, and that the appearance of such attorney for him was unauthorized. *Corbitt v. Timmerman*, 586.
11. **JUDGMENT AGAINST INFANT DEFENDANTS.—A SUMMONS DIRECTED TO P. L. B., ADMINISTRATOR OF P. N. B., AND GUARDIAN OF Bettie, Ida, and Peter Burgett, minors, is amendable, and though not amended, will support, upon a collateral attack, a judgment rendered against the minors upon a return of service upon their guardian, and upon each of them.** *Burgett v. Williford*, 96.
12. **JUDGMENTS BARRED BY STATUTE OF LIMITATIONS.**—If the right of action on a judgment is barred by the statute of limitations, execution cannot issue thereon, nor can a valid levy or sale be made thereunder. *Ledeman v. Hirth*, 588.
13. **CRIMINAL LAW—PRACTICE—NOLLE PROSEQUI.**—Under a statute allowing a *nolle prosequi* to be entered by the attorney-general, in any criminal case, with the consent of the court, after an examination of the case, such consent is conclusive upon the validity of a *nolle prosequi* which the court has allowed the attorney-general to enter before putting the accused on trial. The latter, when arraigned upon an indictment subsequently found and returned by the grand jury for the same crime, cannot, by plea in abatement or motion to quash, draw in question the rightful disposition of the former indictment by *nolle prosequi*. *Lacelles v. State*, 216.
- See APPEAL, 2; ASSIGNMENT; COSTS; EVIDENCE, 8; EXECUTION, 2-4; EXECUTORS AND ADMINISTRATORS, 4; FRAUDULENT CONVEYANCES, 5; HABEAS CORPUS; JUSTICES OF THE PEACE, 1; MECHANIC'S LIEN, 15, 16, 18; PROCESS, 1; TRUSTS, 8.

JUDICIAL SALES.

THE MAXIM OF CAVEAT EMPTOR does not apply to a judicial sale where the defect in the title of the purchaser is occasioned by some irregularity in the proceedings depriving them of the power to divest the title held by the defendant. *Bond v. Montgomery*, 119.

See PARTIES; SUBROGATION, 4-6.

JURISDICTION.

1. **ACTIONS AGAINST NONRESIDENTS.**—A statute providing that when a defendant is a nonresident he may be sued in any court of the state applies to all suits, whether *in rem* or *in personam*. *Baisley v. Baisley*, 726.
2. **AN OBJECTION TO THE JURISDICTION OF AN APPELLATE COURT** may be made at any time, and though not interposed by counsel should be considered by the court if apparent from the record. *Durant v. Comegys*, 267.
See ACCOUNTING; ACTIONS; APPEAL, 1; COURTS; JUDGMENTS, 3, 7.

JURY AND JURORS.

See TRIAL.

JUSTICE OF THE PEACE.

1. **APPEAL FROM JUSTICE'S COURT, EFFECT OF.**—When an appeal is taken from a justice's court to the superior court, and a sufficient undertaking is given to stay execution, the effect is to transfer the entire record to the appellate court, and to cause the action to be retried in that court, as if originally brought therein. In such a case the judgment appealed from is completely annulled, and is not thereafter available for any purpose. *Bullard v. McArdle*, 176.
2. **VACATION OF ORDER DISMISSING APPEAL FROM JUSTICE'S COURT**, and recall of execution issued, after such dismissal by the justice, leaves the cause undetermined and pending before the appellate court, as it was when the appeal was first perfected. It is not essential to the validity of the vacating order that it should be filed in the justice's court. *Bullard v. McArdle*, 176.

See EXECUTION, 5.

LACHES.

See CORPORATIONS, 12; EXECUTORS AND ADMINISTRATORS, 1; JUDGMENTS, 6.

LANDLORD AND TENANT.

DISTRESS FOR RENT.—GOODS OF A STRANGER CONIGNED TO AN AGENT to be sold on commission are not liable to distress for rent due by the agent. *Brown v. Stockhouse*, 908.

See ADVERSE POSSESSION, 8; TRESPASS, 4.

LEASE.

See AUCTIONS, 2; CORPORATIONS, 29; NOTICE, 1.

LEGACY.

See TRUSTS, 3, 4.

LEGISLATURE.

1. **POLICE POWER—REGULATION OF BUSINESS BY LEGISLATIVE BODIES.**—In the exercise of the police power the legislature has a very wide discretion as to what is needful or proper, but is not the exclusive judge as to what is a reasonable and just restraint upon the right of the citizen to pursue a business which is recognized as innocent and useful to the community. As that right is one which is protected by the constitution, it

is always a judicial question whether any particular regulation of the right is a valid exercise of the police power. *Ex parte Whitwell*, 132.

2. **POLICE POWER, RIGHT OF COURTS TO DECLARE WHAT IS VALID EXERCISE OF.**—The power of the courts to declare invalid what they may deem an unreasonable legislative regulation of a business which the citizen has a constitutional right to follow must be exercised with the utmost caution, and only when it is clear that the ordinance or law so declared void passes entirely beyond the limits of the police power, and infringes upon rights secured by the fundamental law. *Ex parte Whitwell*, 152.
3. **CONSTITUTIONAL LAW—POWER AND DISCRETION OF LEGISLATURE.**—In so far as a legislature keeps within the limits of powers in enacting laws its motives cannot be inquired into, and its discretion is not a subject for review in the courts; but whenever and to the extent that it transcends its powers, it is conclusively presumed that it intended to so transcend them, and parol evidence of good motives or other considerations are not allowed to obviate the effect of such unlawful intent. *State v. Cunningham*, 27.
4. **CONSTITUTIONAL LAW—GIFT OF PUBLIC PROPERTY, WHAT IS NOT.**—An act of the legislature releasing a county treasurer from liability for moneys stolen from him without his fault by burglars is not a gift of municipal or public property, but a release of a claim which, though legally due, the legislature finds it to be unjust and oppressive to enforce. *Pearson v. State*, 91.
5. **CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—POWER OF LEGISLATURE.**—The enactment of an apportionment law is an exercise of legislative power, but such power is not absolute and unlimited; on the contrary, it is restricted by constitutional provisions on the subject, and these conditions are absolutely binding upon the legislature, and it has no power, much less discretion, to dispense with any of them. *State v. Cunningham*, 27.
6. **MUNICIPAL CORPORATIONS—RIGHT OF LEGISLATURE TO RELEASE OBLIGATIONS TO.**—If the treasurer of a county has become liable on his official bond to the various school districts therein, on the ground that their moneys were taken by burglars without his fault from a safe furnished him by the county, it is competent for the legislature to release him from such liability. *Pearson v. State*, 91.

See CONSTITUTIONS; EVIDENCE, 5; MUNICIPAL CORPORATIONS, 1-4; STATUTES.

LETTERS.

See EVIDENCE, 7.

LEVY.

See ATTACHMENT, 1, 7, 8; EXECUTION; JUDGMENTS, 12.

LIENS.

See COVENANT, 7, 8; EXECUTION, 1, 2; FRAUDULENT CONVEYANCES, 5; MECHANIC'S LIEN.

LIMITATIONS OF ACTION.

See ADVERSE POSSESSION, 4, 6; EXECUTION, 1, 2; EXECUTORS AND ADMINISTRATORS, 1; JUDGMENTS, 5, 12; PLEDGE, 2; TRUSTS, 7.

MACHINERY.

See DAMAGES, 1.

MALICE.

See DAMAGES, 3; RAILROADS, 15.

MANDAMUS.

See COURTS, 1, 3.

MANDATORY.

See INJUNCTION, 4, 5.

MANSLAUGHTER.

See HOMICIDE, 3, 8.

MARRIAGE.

See HUSBAND AND WIFE; WILLS, 28, 29.

MARRIED WOMEN.

See HUSBAND AND WIFE; MECHANIC'S LIEN, 6, 7; WILLS, 28.

MASTER AND SERVANT.

1. **INSTRUCTIONS TO MINOR EMPLOYEES.**—When young persons, without experience, are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them, and warnings as to the hazard of carelessness in their use. If the employer neglects this duty, or if he gives improper instructions, he is answerable for the injury resulting from this neglect of duty. *Tagg v. McGeorge*, 889.
2. **NEGLIGENCE ARISING FROM HASTE.**—If a minor employee is directed by his foreman to hurry in the doing of dangerous work, and is injured while complying with such instruction, the risk of injury being increased through his haste, such employee may recover for injuries thus received, if he was not aware of the danger, and his will, being subject to that of the foreman, he obeyed him because he thought the foreman knew better, or because he was afraid to disobey. *Tagg v. McGeorge*, 889.
3. **FELLOW-SERVANTS—GRADES OF.**—The Civil Code of California recognizes no distinction growing out of the grades of employment of the respective employees, and gives no effect to the circumstance that the fellow-servant through whose negligence an injury came was the superior of the plaintiff in the general service in which they were in common, engaged. Therefore if a section hand is injured through the negligence of a section foreman by whom the former was employed, and who had power to employ and discharge men employed to work under him, such foreman is answerable, but the master is not. In their relations to their master the section hand and the section foreman are fellow-servants, and neither can recover of him for the negligence of the other except when the master has been guilty of want of ordinary care in the selection of the culpable employee. *Daves v. Southern Pac. Co.*, 183.
4. **VICE-PRINCIPAL.**—An employer is not liable for an injury received by his employee through the negligence of a fellow-servant, unless the act which

caused the injury was one which it was the duty of the employer himself to perform towards his employees. In such a case the offending servant, in the performance of that duty, is regarded as the agent or representative of his employer, and the latter is therefore responsible for his acts. *Daves v. Southern Pac. Co.*, 133.

See RAILROADS, 11, 14, 16, 19-22

MAXIMS.

Damnum absque injuria. Gaus etc. Mfg. Co. v. St. Louis etc. Ry. Co., 706;
Expressio unius est exclusio alterius. Murphy v. Carlin, 699.

MECHANIC'S LIEN.

1. **CONSTRUCTION.**—Statutes giving liens for material used in making improvements upon land are remedial in their nature, and should be given a liberal construction. *Dugan Cut Stone Co. v. Gray*, 767.
2. **MECHANIC'S LIEN FOR SIDEWALK AND AREA PARTLY ON LOT.**—A mechanic's lien will attach to a lot and building thereon for stone used in the construction of sidewalks and areas, a part of which are on the lot and a part on the street, and all of which are built under one contract. *Dugan Cut Stone Co. v. Gray*, 767.
3. **MECHANIC'S LIEN FOR SIDEWALK.**—A sidewalk erected in the street in front of a private building is an improvement and an appurtenance thereto, for which a mechanic's lien will attach to the building and the land upon which it stands. *Dugan Cut Stone Co. v. Gray*, 767.
4. **MECHANIC'S LIEN WILL ATTACH TO AN EQUITABLE INTEREST** in land held under a contract of purchase, and if such interest is afterwards enlarged into a fee, the lien may be asserted against the whole title. *Fulmer v. Poust*, 881.
5. **MECHANIC'S LIEN MAY BE ASSERTED BY A VENDOR OF LAND** when, by the same contract, he agreed to sell the land for a specified sum, and, for another amount, also specified, to erect a building thereon, and he subsequently made the conveyance and erected the building. *Fulmer v. Poust*, 881.
6. **MECHANIC'S LIEN ON THE PROPERTY OF MARRIED WOMEN.**—Under a statute authorizing a married woman to hold, devise, bequeath, and convey her property, real and personal, the same as if she were a *feme sole*, she may enter into a contract for its improvement, and such contract may be the basis of a mechanic's lien for labor and materials. *Hoffman v. McFadden*, 101.
7. **A MARRIED WOMAN'S PROPERTY IS NOT SUBJECT TO A MECHANIC'S LIEN** THOUGH the building is located within forty feet of the dwelling occupied by her and her husband, and she witnessed its construction and progress, and gave some direction to the carpenters, if she showed no more interest in the improvement than a wife would take in a building on land belonging to her husband, and the contract for the work was made with him, and the materials procured on his order, and, for aught that appears to the contrary, were sold on his personal credit, and she did not in fact authorize him to act as her agent, was not consulted about the contract, and had no knowledge of its terms. *Hoffman v. McFadden*, 101.
8. **MATERIALS FURNISHED UNDER ENTIRE CONTRACT.**—When materials have been furnished under a single and entire contract for a number of buildings erected on contiguous lots owned by the person to whom the

material is furnished, a material-man's lien will attach to all of the buildings and lots, and, in an action to enforce such lien, it does not devolve upon the material-man to show how much of the material is placed in each building. *Maryland Brick Co. v. Spilman*, 431.

9. **ENTIRE CONTRACT TO FURNISH MATERIAL—EVIDENCE.**—Under an entire and single contract to furnish material for the erection of a number of buildings on contiguous lots, it is not necessary to entitle the material-man to maintain his lien that he show that the material was actually used in the erection of the buildings provided he shows that such material was delivered to be used in their erection. *Maryland Brick Co. v. Spilman*, 431.

10. **ENTIRE CONTRACT—PART PERFORMANCE.**—Under an entire and single contract to furnish material for the erection of a number of houses on contiguous lots, the material-man is not entitled to a lien against all the buildings and lots until he has furnished the material requisite to the construction of all the buildings. Under such contract a material-man's lien cannot be made available by part performance. *Maryland Brick Co. v. Spilman*, 431.

11. **FAILURE TO FILE STATEMENT** of claim in accordance with the statute relating to mechanics' liens, will not deprive one furnishing material to be used in the construction of a house of the benefit of such lien when the rights of *bona fide* purchasers are not involved, and by the terms of the statute the lien attaches upon the furnishing of materials for a structure to be erected on land under a contract with the owner. *Kirkwood v. Hoxie*, 549.

12. **ENFORCEMENT OF—ERRORS IN ACCOUNT** of the holder of a mechanic's lien will not affect his right to enforce it, such error may be corrected when the case reaches the auditor, whose duty it is to state a correct account. *Maryland Brick Co. v. Spilman*, 431.

13. **WAIVER OF—BUILDING CONTRACT.**—A contract for furnishing the material necessary to erect a number of buildings, which provides that the material-man is to be given certain mortgages as collateral security for the payment of part of the material and a third party's guarantee for the payment of another part, contains nothing inconsistent with the existence of a material-man's lien on all of the buildings after the material has been furnished; nor does it constitute a waiver of such lien, and the payment of such guarantee and mortgages can have no other effect than to reduce the gross amount due for the material furnished. *Maryland Brick Co. v. Spilman*, 431.

14. **WAIVER OF—BUILDING CONTRACT.**—Parties to a building contract may contract as they think proper respecting the manner in which payment for materials may be made and they will not be considered as having waived the material-man's lien for the material furnished, unless they have expressly agreed to such terms as are inconsistent with the existence or enforcement of such lien. *Maryland Brick Co. v. Spilman*, 431.

15. **WAIVER BY PERSONAL JUDGMENT—PURCHASER WITH NOTICE.**—When, after a mechanic's lien has attached to land, the material-man takes a personal judgment against the debtor under circumstances clearly showing an intention to preserve rather than relinquish such lien, it will not be held to have been waived in favor of a subsequent purchaser who acquired title to the land with notice of its existence. *Kirkwood v. Hoxie*, 549.

- 16. WAIVER BY PERSONAL JUDGMENT.**—A mechanic's lien is not waived by taking a personal judgment against the debtor especially when accompanied by circumstances clearly showing an intention to preserve rather than to relinquish such lien. *Kirkwood v. Hoxie*, 549.
- 17. WAIVER—BURDEN OF PROOF.**—When a mechanic's lien is once established the burden of proof is upon the owner of the estate charged to show its relinquishment. While this may be inferred from circumstances, such inference may also be rebutted. *Kirkwood v. Hoxie*, 549.
- 18. WHETHER AFFECTED BY SUBSEQUENT LEGISLATION OR PERSONAL JUDGMENT.**—A vested right to a mechanic's lien for materials acquired under one statute is not affected by a change made by a subsequent statute providing that such lien shall not attach unless a notice of claim is made within sixty days, especially if the latter act is declared unconstitutional. Nor is the lien so acquired lost by an attempted enforcement of the material-man's claim under the latter statute resulting in a personal judgment in his favor before it is declared unconstitutional. *Kirkwood v. Hoxie*, 549.

MEETINGS.

See CORPORATIONS, 2-5.

MENTAL ANGUISH.

See DAMAGES, 5.

MILLS.

See INJUNCTIONS, 3, 4.

MINES.

See CORPORATIONS, 28.

MISDEMEANOR.

See ARREST, 2; SUBROGATION, 6.

MISREPRESENTATIONS.

See CORPORATIONS, 11, 12; NEGOTIABLE INSTRUMENTS, 10.

MISTAKE.

- 1. MISTAKE OF LAW—RELIEF.**—Mere ignorance or mistake of law on the part of a party to a contract will not authorize a court of equity to set it aside. *Kleimann v. Gieselmann*, 761.
- 2. MISTAKE, WAIVER OF RIGHT TO SUE FOR.**—If owing to a mistake in computing the area of a tract of land the vendee paid a sum greater than was due from him, he is not precluded from recovering the excess by accepting a deed of the property, nor by paying, after the discovery of the mistake, a note given in part payment of the purchase price. *Cardinal v. Hadley*, 492.
- 3. WAIVER.—THE RIGHT TO RECOVER A SUM PAID IN EXCESS OF THE PURCHASE PRICE** of a tract of land is not waived by accepting a conveyance thereof when the payment of such excess was due to a mistake made in computing the area of such tract. *Cardinal v. Hadley*, 492.
- See ADVERSE POSSESSION, 7; ALTERATION OF INSTRUMENTS; ARREST, 6-9; AUCTIONS, 2; COSTS; EVIDENCE, 9; SUBROGATION, 2, 3.

MONOMANIA.

See WILLS, 12.

MORTGAGES.

1. A CONVEYANCE INTENDED MERELY AS A SECURITY for a debt is in effect a mortgage between the parties and all persons having notice of the real nature of the transaction. *Wallace v. Smith*, 868.
 2. IF A DEED IS TAKEN FROM A DEBTOR WHOSE DEBT IS NOT SURRENDERED, canceled, nor otherwise discharged, it must be regarded as a mortgage. *Wallace v. Smith*, 868.
 3. TAKING A DEED IN PAYMENT OF PRE-EXISTING INDEBTEDNESS AND EXERCISING ARTICLES giving the grantor the right to repurchase the property within a specified time do not make the obligation a mortgage. *Wallace v. Smith*, 868.
 4. EVIDENCE TO PROVE THAT A DEED WAS INTENDED AS A MORTGAGE.—THE BURDEN OF PROOF is on him who claims that an apparent conveyance of real property is in effect a mortgage. He can prevail only upon clear, precise, and indubitable evidence that the deed was intended by both parties thereto to operate only as a mortgage. But if the evidence is of this character on his side, he is entitled to succeed, though there may be rebutting evidence to the contrary if the court, notwithstanding such evidence, is still convinced of the truth of his claim. *Wallace v. Smith*, 868.
 5. EVIDENCE TENDING TO PROVE THAT AN APPARENT DEED WAS A MORTGAGE.—The *indicia* of intention which may be looked to when a deed absolute on its face is claimed to be a mortgage are the sufficiency of the price paid, the surrender or retention of pre-existing securities or evidences of indebtedness, the obligation to repay the purchase money, and the entry of the grantee in possession. *Wallace v. Smith*, 868.
 6. REDEMPTION—SETOFF.—The redemption of a mortgage cannot be effected by setting off against the mortgage debt an independent personal demand which the mortgagor has against the mortgagee. *Brown v. Coriell*, 789.
- See ALTERATION OF INSTRUMENTS, 2; ASSIGNMENT, 2; AUCTIONS, 2; CHATTEL MORTGAGES; HUSBAND AND WIFE, 12, 13; MECHANIC'S LIEN, 13; NOTICE, 1; SUBROGATION, 2, 3.

MULTIPLICITY OF SUITS.

See EQUITY, 1; INJUNCTION, 2.

MUNICIPAL CORPORATIONS.

1. CORPORATIONS.—A CORPORATION DOES NOT BECOME A PUBLIC ONE merely by receiving a charter from the legislature, by owing certain duties to the public, or by being subjected to rules and regulations established in the exercise of the police power. *Mount Hope Cemetery v. Boston*, 515.
2. LEGISLATIVE CONTROL OF PROPERTY OF.—Over property which a municipality has acquired for purposes deemed strictly public, that is, which it holds merely as an agency of the state government, for the performance of duties devolving upon it, the legislature may exercise a control to the extent of requiring the municipality, without compensation, to transfer the property to some other agency of the government, appointed to perform similar duties, and to be used for similar purposes, and perhaps for other purposes strictly public in character. This legis-

- lative control does not extend to property acquired for special purposes not deemed strictly and exclusively public and political. *Mount Hope Cemetery v. Boston*, 515.
3. **THE LEGISLATIVE CONTROL OF MUNICIPAL PROPERTY**, when it exists, does not extend so far as to enable the legislature to require a transfer without compensation to a private person, or to a private corporation. *Mount Hope Cemetery v. Boston*, 515.
 4. **LEGISLATIVE AUTHORITY TO DIVEST PROPERTY OF IN PUBLIC CEMETERIES**.—A statute requiring a city to transfer a cemetery to another corporation is unconstitutional if the property used as a cemetery was purchased and improved by the city, and it had the right to hold the cemetery not only for the burial of poor persons, but with the right to make sales of burial rights to any persons who might wish to purchase them, whether residents or nonresidents. *Mount Hope Cemetery v. Boston*, 515.
 5. **STREET RAILWAYS—MUNICIPAL CONTROL—ORDINANCE CONCERNING SALE OF TICKETS**.—The rights and franchises of a street railroad company are not destroyed or unreasonably impaired by a city ordinance requiring it to sell tickets to all persons applying therefor on each of its cars and to be good for transportation over its entire route or any portion thereof, traveling continuously either way between certain hours at the rate of eight tickets for twenty-five cents. Such ordinance may provide for its enforcement by making each day's neglect to comply therewith an offense punishable by fine, and authorizing the collection of such fine in an action at law. *Detroit v. Fort Wayne etc. Ry. Co.*, 580.
 6. **STREET RAILWAYS—MUNICIPAL CONTROL UNDER RESERVATION IN ORDINANCE**.—If the municipal ordinance under which a street railroad is operating contains a reservation of the right "to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public" the right is reserved to enact an ordinance providing that the railway company shall, for the accommodation of the public, keep tickets for sale upon the cars. It cannot be contended that the relation created by the first ordinance was contractual, and at the same time that the reservation was of the right to enact police regulations only. The right to exercise police power exists independent of the reservation, and cannot be bartered away. The contract relation created by such ordinance is not unilateral nor intended as a shield for the railway company alone. *Detroit v. Fort Wayne etc. Ry. Co.*, 580.
 7. **STREET RAILWAYS—MUNICIPAL CONTROL—CONSTITUTIONAL LAW**.—When power is conferred by statute upon a municipality to refuse its consent to the operation of a street railway in its street, its right is absolute and its power, in the first instance, to impose conditions, is unlimited, and the nature of the conditions imposed does not depend upon other grants of power. Respecting the imposition of further conditions after consent given, it is only necessary that the municipality keep within the scope of the reservations retained. *Detroit v. Fort Wayne etc. Ry. Co.*, 580.
 8. **RIGHT TO ENFORCE ORDINANCES BY FINE**.—The reservation in an ordinance of the right to impose further conditions involves the right to provide for the enforcement of such conditions by the imposition of reasonable and proper fines. *Detroit v. Fort Wayne etc. Ry. Co.*, 580.

- 9. RIGHT TO ENFORCE ORDINANCES BY FINE.**—Irrespective of statutory authority a municipality has implied power to provide for the enforcement of its ordinances by the imposition of reasonable and proper fines. *Detroit v. Fort Wayne etc. Ry. Co.*, 580.
- 10. POLICE POWER—ORDINANCE DENYING PROPERTY OWNER THE RIGHT TO CONDUCT A BUSINESS THEREON, WHEN VOID.**—An owner of property cannot be prohibited by a legislative body from conducting thereon a lawful business, unless such business is of such a noxious or offensive character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality. An asylum for the treatment of mild forms of insanity is not a business of that character, and therefore a provision in an ordinance of a board of county supervisors declaring that no asylum in which persons suffering from any degree of insanity are treated shall be permitted within four hundred yards of any dwelling or school is not a valid police regulation. *Ex parte Whitwell*, 152.
- 11. POLICE POWER—ORDINANCE REQUIRING SEPARATION OF PATIENTS IN PRIVATE ASYLUM, WHEN VOID.**—The proprietor of a private asylum for the treatment of certain specified forms of mild insanity cannot be compelled to provide separate buildings for the different classes of patients, nor to segregate male from female patients. *Ex parte Whitwell*, 152.
- 12. POLICE POWER—ORDINANCES IMPOSING UPON THE PROPRIETOR OF A PRIVATE ASYLUM EXPENSES WHICH ARE NOT NECESSARY** for the protection of the public are invalid. Hence such proprietor cannot be required to surround by a brick or stone wall, of not less than twelve feet high and eighteen inches thick, an asylum in which only patients suffering from the milder forms of insanity are to be treated. *Ex parte Whitwell*, 152.
- 13. POLICE POWER—ORDINANCE REQUIRING ASYLUMS FOR INSANE PERSONS TO BE FIREPROOF, WHEN VOID.**—The board of supervisors of a county, in the absence of any general legislation on the subject, may, by ordinance, prescribe proper regulations for the protection of patients in a private asylum for insane persons from the danger which might result to them from the destruction of the asylum building by fire; but a requirement that such an asylum shall be maintained only in a building constructed of either brick and iron, or stone and iron, without any reference to the size of the building, or the number of the patients it is designed to accommodate therein, and without regard to other safeguards against fire with which it may be provided, is unreasonable. Legislation of this character, which imposes an onerous expense upon a lawful business, can only be justified by the fact that the danger which it ostensibly seeks to avert is one which experience has demonstrated to be a probable result of conducting the business, notwithstanding the exercise of ordinary care to prevent it. *Ex parte Whitwell*, 152.
- 14. CONSTITUTIONAL LAW—MUNICIPAL WORK COMPLETED UNDER COLOR OF LAWFUL AUTHORITY** and an existing statute must thereafter be regarded as lawfully done. *King v. Philadelphia Co.*, 817.
- 15. ORDINANCES CONTAINING GRANTS** may partake of the nature of contracts, yet they are none the less by-laws, and have the force and effect, in favor of the municipality, and against persons bound thereby, of laws passed by the legislature of the state. The power to enact them involves all the incidents necessary to give effect thereto. *Detroit v. Fort Wayne etc. Ry. Co.*, 580.

- 16. CONSTRUCTION OF ORDINANCES.**—When a municipal ordinance is good in part and bad in part, it is only necessary, in order to maintain the ordinance, that the valid and invalid parts be so distinct and independent, that the invalid may be eliminated, and what remains contain all the essentials of a complete ordinance. *Detroit v. Fort Wayne etc. Ry. Co.*, 530.
See CORPORATIONS, 1; CREDITOR'S SUIT; STATUTES, 1, 2.

MURDER.

See HOMICIDE.

MUTUAL BENEFIT SOCIETIES.

See INSURANCE, 9-15.

NEGLIGENCE.

- 1. INJURIES RECEIVED FROM FALLING OBJECTS IN PUBLIC THOROUGHFARES.**
Evidence that an object whose fall has caused an injury to a traveler upon a public thoroughfare was under the management of the defendant or his servants is sufficient to establish a want of due care on the part of such defendant, if the accident is such as in the ordinary course of things does not happen, and no adequate explanation of its occurrence is offered. *Dixon v. Plums*, 180.
 - 2. HIGHWAYS—DUTY OF PERSONS WORKING ON SCAFFOLDINGS.**—A person engaged with tools and materials upon a scaffolding erected directly over a thoroughfare where people are constantly traveling is required to exercise the greatest care in the performance of his work, so that passersby may not be injured, and evidence showing that the plaintiff, while traveling upon the sidewalk, was injured by the fall of a tool from the scaffolding is sufficient to establish a *prima facie* case of negligence against the person working thereon. *Dixon v. Plums*, 180.
 - 3. WHEN A QUESTION FOR JURY.**—If there is reasonable doubt as to the facts or the inferences to be drawn from them, the question of negligence is solely for the jury to determine.—*Vannatta v. Central R. R. Co.* 823.
 - 4. WHEN QUESTION FOR JURY.**—When, in an action to recover for personal injuries received from a fall over an obstruction in the streets of a city, the proof clearly shows that though the accident happened in the night-time, yet the street was well lighted, and that the party injured could have seen the obstruction if she had been looking for it, and her testimony shows that just before she stumbled over it she heard a whistle and became frightened and hurried on, the jury should determine the question whether or not this circumstance coupled with the fact that it was in the night-time is sufficient to excuse her immediate attention to the walk at the exact time of the injury. *Graves v. Battle Creek*, 561.
 - 5. CONTRIBUTORY NEGLIGENCE, WHAT IS NOT.**—In an action to recover damages for an injury received through the falling of a chisel from a scaffolding, a motion for a nonsuit is properly denied, where the evidence shows that the plaintiff, at the time when he was thus injured, was upon a sidewalk along which people were constantly passing and that he had no sufficient reason to anticipate danger from overhead. *Dixon v. Plums*, 180.
- See ARREST, 9; BAILMENT 1, 2; DAMAGES 5; EQUITY 2; MASTER AND SERVANT; PARENT AND CHILD; PLEDGE 1; RAILROADS 3, 4, 13, 14; 18-22, 25-27.

NEGOTIABLE INSTRUMENTS.

1. **INSURANCE—NOTE FOR WHEN MADE WITHOUT CONSIDERATION, AND VOID.**—A note given to the agent of an insurance corporation to procure insurance on the life of the maker is without consideration and void if the contract for insurance provides that it shall be void, unless the premium is paid in cash, and that none but certain designated officers have authority to waive the condition, and the agent receiving the note did not himself pay the premium to the insurer nor do anything except to charge himself and credit the insurer with the amount of such premium, and the latter did not know that the payment had not been made in cash nor in any way waive the condition requiring such payment. *Dunham v. Morse*, 473.
2. **CONSIDERATION—KNOWLEDGE OF THE CONSIDERATION** by one indorsing a promissory note for the accommodation of another is not necessary except when the note has been issued and become operative before such indorsement, and the indorsement must therefore be regarded as a new contract. *Robertson v. Rowell*, 466.
3. **THE PRESUMPTION THAT THE HOLDER ACQUIRED A NEGOTIABLE INSTRUMENT IN GOOD FAITH** without notice of fraud arises upon proof that he paid full value for it before maturity. *Market etc. Nat. Bank v. Sargent*, 376.
4. **NOTICE BY MAIL—PRESUMPTION.**—A notice of protest and dishonor of a promissory note inclosed in a prepaid envelope requesting its return if not delivered, properly addressed, to the indorser at the place where he regularly receives his mail matter, and deposited in the postoffice, is, in the absence of its return undelivered, *prima facie* evidence of its receipt by him, sufficient to charge him as an indorser. *Jensen v. McCorkell*, 843.
5. **NOTICE OF PROTEST AND OF NONPAYMENT** of a bill of exchange is not necessary to charge one who is both the drawer and acceptor thereof. *Garden City Nat. Bank v. Fittler*, 874.
6. **If a bill is indorsed to a bank for collection**, it may, without any indorsement on its part, return such bill to its indorser, who is thereupon entitled to maintain an action thereon as if he had not so indorsed it. *Garden City Nat. Bank v. Fittler*, 874.
7. **ACCOMMODATION BILL.**—The averment that certain bills were accepted for the accommodation of the drawers on their representation that the proceeds would be applied to specific purposes, and that the drawers failed to apply such proceeds to such purposes, does not allege any defense as against the *bona fide* holder of such bills. *Garden City Nat. Bank v. Fittler*, 874.
8. **NOTE, CHANGE OF PAYEE—A SEALED NOTE PAYABLE TO A PARTICULAR PERSON** and made for a specific purpose and not negotiable in form cannot, without the consent of the surety thereon, be delivered to another person on the payee named therein refusing to accept it, and any person receiving it other than the original payee is chargeable with notice of any defenses existing against it. *Janes v. Benson*, 899.
9. **A NOTE INDORSED AFTER MATURITY** is equivalent to one payable on demand, and unless payment thereof is demanded and, in the event of refusal, notice given to the indorser within a reasonable time, the latter cannot be held. *Beer v. Olifton*, 172.
10. **EXECUTION OF, IN BLANK.**—If one affixes his signature to a printed blank for a promissory note, and intrusts it to the custody of another

for the purpose of having the blanks filled up, he thereby confers the right, and such instrument carries on its face the implied authority to fill up the blanks and complete the contract at pleasure as to names, terms, and amounts so far as consistent with the printed words, and an oral agreement between the maker and his agent limiting the amount for which the note shall be perfected cannot affect the rights of an indorsee who takes the note before maturity for value, in ignorance of the agreement that a different amount should be written in it. *Marbit etc. Nat. Bank v. Sargent*, 376.

11. **PROMISSORY NOTE.**—A TRANSFEREE OF A NON-NEGOTIABLE NOTE is not bound to inquire of the maker whether any defenses exist against it, and failing to do so, he stands exactly in the shoes of the person from whom he receives it. If that person could not recover, the transferee cannot. *James v. Benson*, 899.

See **ASSIGNMENT**, 2; **BANKS**, 2; **FORGERY**, 3, 4; **HUSBAND AND WIFE**, 11; **PARTNERSHIP**; **PAYMENT**; **SURETYSHIP**, 4.

NEWSPAPERS

See **CONTRACTS**, 10; **FALSE IMPRISONMENT**, 1.

NEW TRIAL

1. **IF EVIDENCE INCOMPETENT FOR ANY PURPOSE IS ADMITTED**, and may have influenced the jury in determining a material issue, a new trial must be granted. *Miller v. Curtis*, 469.
2. **NEW TRIAL** will sometimes be granted on account of the misconduct of counsel in attempting to get before the jury matters not within the issues by means of improper questions and offers of proof. *Marshall v. Taylor*, 144.
3. **THAT AN INSTRUCTION WAS GIVEN TO THE JURY IN THE ABSENCE OF COUNSEL** is not a cause for a new trial, if it is given in open court after the cause had been submitted to the jury. It is the duty of the parties and their counsel to be present in court while it is open, after the trial of the action has been begun until it is concluded, and the presiding judge cannot be prevented from giving a further instruction to the jury because one or both of the parties or their counsel have absented themselves from the court while in session and while the jury are deliberating upon the case. *Kullberg v. O'Donnell*, 507.

See **EXECUTION**, 3; **SEDUCTION**, 5.

NOLLE PROSEQUI

See **JUDGMENTS**, 13.

NONRESIDENTS.

See **ADVERSE POSSESSION**, 8; **JURISDICTION**, 1; **PROCESS**, 2.

NONSUIT.

See **EJECTMENT**, 1; **NEGLECT**, 5.

NOTICE

1. **RECORDING A MORTGAGE MADE BY THE LESSEES OF PERSONAL PROPERTY** having the right to acquire title thereto on making certain designated

payments does not operate as constructive notice to their lessors. *Robinson v. Bird*, 405.

2. **CHATTEL MORTGAGE—RECORD AS NOTICE OF INDEPENDENT CONTRACT.**—If a contract is referred to in a recorded mortgage all persons claiming under it take with notice of such contract. *National Bank v. Morris*, 754.
 2. **CHATTEL MORTGAGE—EXTRATERRITORIAL EFFECT OF RECORD OF.**—A chattel mortgage duly executed and recorded in the state where the property is situated imparts notice to an innocent purchaser who buys the property in another state to which it has been removed by the mortgagor, unless the mortgage is opposed to the laws and public policy of the latter state. The fact that the mortgage provides that the mortgagor is to remain in possession of the property until forfeiture for failure to pay the debt upon its maturity makes no difference in such case. *National Bank v. Morris*, 754.
 4. **THE PLEA OF "INNOCENT PURCHASER" IS AN AFFIRMATIVE DEFENSE**, and must be affirmatively pleaded and proved. *Holdsworth v. Shannon*, 719.
- See ADVERSE POSSESSION, 4; AGENCY, 1; ANIMALS, 1; APPEAL, 1; ARBITRATION, 1, 2, 5; ASSIGNMENT; BANKS, 2; CHATTEL MORTGAGES; CORPORATIONS, 6, 7; COSTS, 2; EXECUTION, 5; MECHANIC'S LIEN, 18; NEGOTIABLE INSTRUMENTS, 3, 8, 9; NUISANCE.

NUISANCE

- RIGHT TO ABATE WITHOUT NOTICE—TREES OVERHANGING BOUNDARY.** Branches of trees standing upon land adjoining a railroad company's right of way, and overhanging it to such an extent that at times they brush against the faces of the railroad company's engineers and obscure their view when their duties require them to maintain a lookout are a nuisance, which the company may abate by removing the overhanging branches without notice to the adjoining landowner. The fact that he refuses an offer of ten dollars made by the company for the removal of trees claimed by it to be a nuisance will not confer upon him the right to exact further notice before such overhanging branches are removed. *Hickey v. Michigan etc. R. R. Co.*, 621.
- See WATERS, 5.

OFFICERS.

1. **DEALINGS BETWEEN A PUBLIC OFFICER AND HIMSELF AS A PRIVATE CITIZEN** which bring him into collision with other citizens, equally interested with himself in the integrity and impartiality of the office, are against public policy. *Goodyear v. Brown*, 903.
2. **DISQUALIFICATION TO ACT WHERE THEY ARE INTERESTED.**—A DEPUTY secretary of internal affairs, whose duties are analogous to those of a deputy surveyor-general, will not be allowed to apply for and take measures necessary to acquire title to, a tract of public land. Public policy cannot tolerate such dealings by an officer with his own department or office. *Goodyear v. Brown*, 903.
2. **OFFICERS DE FACTO.**—ACTS OF OFFICERS *de facto* are invalid when they concern themselves, but are valid when they concern the public or the rights of strangers and third persons who have an interest in the acts done. *King v. Philadelphia Co.*, 817.
4. **CONSTITUTIONAL LAW—ACTS DONE BY DE FACTO OFFICERS UNDER UNCONSTITUTIONAL STATUTE.**—Acts performed by officers *de facto* in the

exercise of their official functions and strictly within the limits of an existing statute are not illegal although such law is afterwards judicially declared unconstitutional. *King v. Philadelphia Co.*, 817.

6. **POWER TO ACCEPT RESIGNATION OF.**—In the absence of express statutory enactment, the power to accept the resignation of a public officer is vested in the authority which has the power to appoint a successor to fill the vacancy. *State v. Augustine*, 696.

6. **REQUISITES OF A VALID RESIGNATION.**—A resignation of a public office need not be in any particular form. It is sufficient that the incumbent evince, by parol or in writing, a purpose to relinquish the office; that this purpose be communicated to the proper authority, and that the resignation be accepted, either in terms or by something tantamount to an acceptance, such as the appointment of a successor. *State v. Augustine*, 696.

7. **RECALLING RESIGNATION.**—When a resignation of a public officer has been communicated to the proper authority, and by him accepted, whether formally or by the appointment of a successor, it is beyond recall, and cannot afterwards be withdrawn. Nor is this result changed by the fact that a formal commission was not issued to the new incumbent until some days after the governor was notified that the former incumbent wished to withdraw his resignation. *State v. Augustine*, 696.

See **ARREST**; **BAILMENT**, 2; **BANKS**; **CORPORATIONS**, 7-9; **EVIDENCE**; **LEGISLATURE**, 4, 6; **RAILROADS**, 9; **STATUTES**, 10; **TRESPASS**, 1-3.

OPINION.

See **HOMICIDE**, 5.

ORDINANCES.

See **MUNICIPAL CORPORATIONS**, 5, 6, 8-10, 12, 13, 15, 16.

PARENT AND CHILD.

A **WIDOWED MOTHER** with whom a minor child lives, and by whom it is supported, and for whom the child works as a member of the family, is entitled to recover for the loss of services of the child, and for labor performed and for expenses reasonably incurred in its care, so far as they are the consequences of an injury to the child negligently caused by the defendant. *Horgan v. Pacific Mills*, 504.

See **GIFTS**, 1; **HOMESTEAD**, 3; **RAILROADS**, 10.

PARI DELICTO.

See **CONTRACTS**, 6; **EQUITY**, 3, 4; **SUBROGATION**, 6.

PAROL.

See **EVIDENCE**, 9, 10.

PARTIES.

SUBROGATION.—One who sues to be subrogated to the rights of creditors of a decedent, on the ground that he has purchased property at a void judicial sale made to raise money to pay their claims, must make them parties defendant. *Bond v. Montgomery*, 119.

PARTITION.

1. **IN ORDER TO MAINTAIN** partition there must be a concurrent holding, as the nature of the action is possessory, its object being to distribute the possession between those entitled to it. It is an adversary suit. *Metcalf v. Miller*, 617.
2. **ESTATE IN REMAINDER.**—The owner of an estate by curtesy together with an undivided interest in the remainder is entitled to partition as to the latter, against the remainder-men. *Atkinson v. Brady*, 744.
3. **ESTATE HELD BY ONE BY CURTESY ONLY** is not subject to partition as against the remainder-men. *Atkinson v. Brady*, 744.
4. **PARTITION AS BETWEEN COTENANTS AND REVERSIONERS.**—The owners of life estates are holders in cotenancy, and as between them, partition may be had, but they are not entitled to partition as against the reversioners. *Metcalf v. Miller*, 617.
5. **PARTITION AS BETWEEN COTENANT AND REVERSIONER.**—A husband who owns an interest in the life estate of his wife in possession and an undivided interest in the reversion is not entitled to partition as against the other reversioners. *Metcalf v. Miller*, 617.

See COTENANCY, 7; HUSBAND AND WIFE, 6.

PARTNERSHIP.

1. **A PROMISSORY NOTE GIVEN BY A PARTNERSHIP TO THE WIFE OF ONE OF ITS MEMBERS** is void, and equity will not interfere for her relief. *Clark v. Patterson*, 498.
 2. **A NOTE SIGNED BY ONE PARTNER AND INDORSED BY THE OTHER** is not an undertaking of the firm, and in case of its insolvency is not payable out of its assets. *Clark v. Patterson*, 498.
- See ASSIGNMENT FOR BENEFIT OF CREDITORS, 7-9; HUSBAND AND WIFE, 7.

PATENTS.

See PUBLIC LANDS.

PAYMENT.

1. **NOTES OF THIRD PERSON—QUESTION FOR JURY.**—Whether or not the taking of the notes of a third person by a creditor is intended as absolute payment of the debt or as collateral security merely, is a question of fact dependent upon whether or not an actual agreement to that effect is made by the parties. *Shepherd v. Busch*, 815.
2. **NOTE OF THIRD PERSON.**—When the note of a third person is received by a creditor the burden of proving that it was accepted in payment of a debt is upon the debtor. *Shepherd v. Busch*, 815.
3. **NOTE OF THIRD PERSON.**—The mere acceptance by a creditor from a debtor of the note of a third person, to the creditor's order, for a pre-existing indebtedness, is not absolute, but merely conditional payment, defeasible on the dishonor or nonpayment of the note. *Shepherd v. Busch*, 815.
4. **EVIDENCE OF.**—When a creditor accepts a certain amount from his debtor in payment of the debt and the remainder in the notes of third persons, a simple receipt given by him to the debtor for the total amount represented by the cash and the notes is some evidence to be considered by the jury that the notes are taken as an absolute payment, but it is very feeble. *Shepherd v. Busch*, 815.

See ESTOPPEL, 2; EVIDENCE, 9; EXECUTION, 3; INSURANCE, 16; MISTAKE, 2, 3; MORTGAGES, 3; NEGOTIABLE INSTRUMENTS, 1; SUBROGATION, 2, 3.

PERSONAL EXAMINATION.

See TRIAL, 2.

PERSONAL PROPERTY.

See ANIMALS, 14; ASSIGNMENT FOR BENEFIT OF CREDITORS, 7; AUCTIONS, 2; COTENANCY, 4; NOTICE, 1.

PHOTOGRAPHS.

See ARREST, 7-9; FALSE IMPRISONMENT, 2.

PHYSICIANS.

See WITNESSES.

PLEADING.

See CORPORATIONS, 30; EJECTMENT, 1; EXECUTORS AND ADMINISTRATORS, 2; NOTICE, 4.

PLEDGE.

1. COLLATERAL SECURITIES.—TO AN ACTION ON THE PRINCIPAL DEBT THE DEFENSE THAT COLLATERAL SECURITIES GIVEN for its payment have been lost or rendered worthless through the negligence of the creditor is admissible. *First Nat. Bank v. O'Connell*, 313.

2. COLLATERAL SECURITIES.—THE HOLDER OF COLLATERAL SECURITIES MUST AT LEAST EXERCISE SUCH DILIGENCE in their collection that they shall not be lost through the operation of the statute of limitations, and if such statutory defense has become perfect, the giver of the collateral security may, by a counterclaim, recover the value of his collateral, though it has not yet been ascertained that his debtor will, when sued on such collateral, plead such statute in defense. *First Nat. Bank v. O'Connell*, 313.

See BAILMENT.

POLICE POWER.

See LEGISLATURE, 1, 2; MUNICIPAL CORPORATIONS, 6, 10-13; STATUTES, 11.

POPULATION.

See CONSTITUTIONS.

POSSESSION.

See ADVERSE POSSESSION; AUCTIONS, 2; BAILMENT, 4; COTENANCY, 1-4; ESTATES; TROVER.

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See PUBLIC LANDS.

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PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROBABLE CAUSE.

See ARREST, 7.

PROBATE COURTS.

See HOMESTEAD, 1.

PROCESS.

1. JUDGMENTS.—A SUMMONS DEFECTIVE IN A MATTER WHICH IS AMENDABLE may be considered as amended when collaterally questioned. *Burgott v. Williford*, 96.
 2. SERVICE OF ON NONRESIDENT SUITOR—A nonresident plaintiff who voluntarily attends court in the state where suit is brought is amenable to ordinary civil process in another action. *Baisley v. Baisley*, 726.
 3. APPLICATION FOR CHANGE OF VENUE IS AN IMPLIED WAIVER OF SERVICE OF. *Baisley v. Baisley*, 726.
- See ACTIONS; EVIDENCE, 8; JUDGMENTS, 10, 11; TRESPASS, 1-3.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See NEGOTIABLE INSTRUMENTS, 4, 5.

PROXIMATE CAUSE.

See INSURANCE, 1, 2.

PUBLIC LANDS.

1. PRE-EMPTION-CERTIFICATE OF FINAL PAYMENT, POWER OF LAND OFFICE TO CANCEL.—The land office of the United States has the power to cancel all entries of public lands at any time before a patent issues thereon, on proof that the entryman has failed to comply with the law and has procured his final receipt or certificate on false evidence. *Jones v. Meyers*, 259.

- 2. PRE-EMPTION CLAIMANT, RIGHTS OF PURCHASER FROM.—**UNTIL A PATENT ISSUES the rule of *caveat emptor* applies with peculiar force to purchasers of land from pre-emption entrymen. Therefore, after such purchase, the title of the purchaser may be destroyed by the canceling by the land office of the certificate of final proof and payment, upon a hearing at which it is shown that such certificate was procured by false testimony respecting the residence of the pre-emptor on the land. *Jones v. Meyers*, 259.

PUBLIC POLICY.

See **CONTRACTS**, 7, 8; **NOTICE**, 3; **OFFICERS**, 1, 2.

QUANTUM MERUIT.

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See **TRIAL**.

QUO WARRANTO.

See **COURTS**, 1.

RAILROADS.

- 1. HIGHWAYS, CONSTRUCTION OF RAILROADS ON, NOT A NEW SERVITUDE.—**Laying a track on the established grade of a street, under proper legislative authority, and operating a steam railroad thereon in the transaction of commercial business, is not a perversion of the street from its original purposes. *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 706.
- 2. HIGHWAYS, DAMAGES FOR OPERATION OF RAILROAD ON.—**Damage to the abutting property from the operation of a steam railroad on a public street is *damnum absque injuria*, when the only substantial injuries special to the plaintiff consist in the interference with his free access to his property, the obstruction of the light and air across the open street, the smoke, cinders, and dust from the engine and cars, and the noise and jarring of the ground, caused by the movement of the trains. *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 706.
- 3. HIGHWAYS.—**NEGLIGENT MAINTENANCE OF A RAILROAD TRACK, or negligent operation of trains upon a street, renders the railroad company liable for resulting damages. *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 706.
- 4. LIABILITY FOR LOSS OF GOODS DETAINED BY FLOOD.—**When a railroad train containing several carloads of whisky, in course of transportation, is detained by flood, but is left on the track uninjured, and, while it is so detained, thieves break open the cars and seize some of the whisky in open daylight and in the presence of the trainmen, who make no effort at resistance and then desert the train, after which the remainder of the whisky is destroyed by citizens who have guarded it for some time to prevent it from falling into the hands of lawless men, the company is guilty of negligence and liable for the full value of the goods lost. *Lang v. Pennsylvania R. R. Co.*, 846.
- 5. COMMON CARRIERS—DETENTION OF TRAIN BY FLOOD—LIABILITY FOR GOODS STOLEN.—**The fact that a railroad train is detained uninjured by flood which furnishes an opportunity for plunder will not relieve the carrier from liability for the loss of goods undergoing transportation

and which are stolen in open daylight in the presence of the carrier's employees, who make no effort to resist the thieves or to protect the goods. *Lang v. Pennsylvania R. R. Co.*, 846.

6. **RIGHT TO MAKE AND ENFORCE RULES.**—A railroad company has a right to make and enforce rules and regulations in regard to the admission of passengers to its trains, provided such rules are reasonable, and do not subject the passenger to unnecessary inconvenience and annoyance. *Northern etc. Ry. Co. v. O'Conner*, 422.
7. **LIABILITY FOR EXPELLING COLORED PASSENGER FROM WAITING-ROOM SET APART FOR WHITES.**—In an action for damages brought against a railroad company by a colored woman, who alleged that she had been forcibly expelled from a waiting-room set apart for whites, and abused and beaten by the company's servants, an instruction to the jury to find for the defendant "if they believe from the evidence that a suitable waiting-room was provided by defendant for colored people, and that plaintiff entered and occupied that one set apart for white people," is erroneous, inasmuch as it makes no reference to the manner of plaintiff's ejection from the waiting-room. The right of ejection should be exercised in a proper manner, and whether it was so exercised is one of the questions put in issue by the plaintiff's allegations. *Rose v. Louisville etc. Ry. Co.*, 686.
8. **DUTY TO PROVIDE WAITING-ROOMS FOR COLORED PASSENGERS.**—Where a colored woman sues a railroad company for ejecting her from a waiting-room set apart for whites, and she seeks to establish her right to the use of such room by evidence that the waiting-room for colored people was in a separate building about one hundred and twenty-five yards from the usual stopping-place of the trains, and therefore so far away that she could not use it without the danger of missing her train, an instruction asked for by the plaintiff that the jury ought to find for the plaintiff if they believed from the testimony "that there was no suitable room for colored people in which plaintiff could wait for the train," should not be modified by the court so as to read "suitable or comfortable waiting-room," since, with the inserted words, it is subject to the criticism of ignoring the question of distance. *Rose v. Louisville etc. Ry. Co.*, 686.
9. **LIABILITY OF, FOR ACTS OF PEACE OFFICERS.**—A railway corporation is liable for the acts of a peace officer in wrongfully ejecting a person from the waiting-room, if he acted under the direction of the corporation or its employees. *Rose v. Louisville etc. Ry. Co.*, 686.
10. **SICK PASSENGERS.**—If plaintiff's son was taken seriously ill, and while thus sick was received as a passenger on one of defendant's trains; and both the ticket agent of defendant and the conductor of the train were apprised of his helpless condition, and also informed that he was traveling by rail and not by steamboat because it was important for him to reach his home without delay; and the conductor promised to give him the necessary attention during the journey and to have him carried from the train at his place of debarkation; and when the son arrived at his destination he was unconscious and unable to take care of himself; and the conductor failed to awake him and have him removed from the train, on which he was left till it reached a small wayside station with no accommodations, about thirty miles farther on where he was put off the train at two o'clock in the morning with no one to care for him, and left in the same helpless and neglected condition for nearly forty hours,

- continually growing worse; and was then taken back to the station at which it was intended that he should have disembarked and, although medical aid was at once summoned, died soon afterwards, the railway company is answerable in damages. *Weightman v. Louisville etc. Ry. Co.*, 660.
11. **RULE REQUIRING EXHIBITION OF TICKET.**—A railroad company may, for its protection, enforce a rule requiring passengers to exhibit their tickets to a gateman in passing to a train, and the latter may, in the exercise of his judgment, refuse to allow one to pass through the gate on a defaced ticket, but the company is liable for the wrongful and injurious exercise of judgment by its gateman in this respect. *Northern etc. Ry. Co. v. O'Conner*, 422.
 12. **RULE REGULATING EXHIBITION OF TICKETS.**—When a rule made by a railroad company provided that the holders of defaced tickets may be refused admittance to trains, and referred to the ticket receiver for investigation, the holder of a ticket who in good faith presents it to the gateman in the same condition as when he got it, is not obliged to get the indorsement of the ticket receiver because its genuineness has been questioned by such gateman. This would not only subject the passenger to great inconvenience but in many cases would also make it impossible for him to get such indorsement in time to take the train, and if he is subjected to such inconvenience without fault on his part the company is liable in damages. *Northern etc. Ry. Co. v. O'Conner*, 422.
 13. **RULE REGULATING EXHIBITION OF TICKETS—NEGLIGENCE OF PASSENGER.**—When a railroad company's rule provides that the holders of defaced tickets may be refused admission to trains, and a passenger presents a ticket so defaced by his own act of negligence as to make its date illegible, the gateman or ticket receiver has a right to refuse to honor it, and refuse to allow him to pass to the train, and for such refusal no action will lie. *Northern etc. Ry. Co. v. O'Conner*, 422.
 14. **RULE REQUIRING EXHIBITION OF TICKET—NEGLIGENCE OF COMPANY.** When a rule of a railroad company provides that the holder of a defaced ticket may be refused admission to trains, and a passenger presents his ticket in the same condition as it was when he got it, though it is blurred and defaced without his fault, the refusal of the agent of the company to allow him to pass to the train will render the company liable in damages. *Northern etc. Ry. Co. v. O'Conner*, 422.
 15. **MEASURE OF DAMAGES FOR REFUSAL TO HONOR TICKET.**—The measure of damages against a railroad company for wrongfully refusing to honor a passenger's ticket is, in the absence of malice, wantonness, or circumstances of aggravation, such damages only as are the immediate and necessary consequences resulting from the wrongful act, such as expenses incurred by the passenger by reason of such wrongful refusal to allow him to enter the cars, the amount paid for another ticket, compensation for loss of time, hotel expenses, and inconvenience suffered, if it be such as is capable of being ascertained and assessed at a money value. *Northern etc. Ry. Co. v. O'Conner*, 422.
 16. **REFUSAL TO HONOR TICKET—FACTS NOT JUSTIFYING EXEMPLARY DAMAGES.**—When a railroad gateman wrongfully refuses to honor a passenger's ticket, or to allow him to pass to the train, on the ground that the ticket is defaced and looked as though its date had been rubbed out purposely, the fact that the gateman referred the passenger

to the company's ticket receiver for his indorsement of the ticket, and that the gateman had time before the departure and without neglect of duty to have reported the case to the receiver himself, and failed and refused so to do, does not show such wanton or reckless indifference to the rights of the passenger as will justify a recovery of exemplary or punitive damages. If, in such case, the gateman used offensive or insulting language to the passenger, such conduct on his part would justify an award of exemplary damages. *Northern etc. Ry. Co. v. O'Conner*, 422.

17. **PERSON TRAVELING ON A FREIGHT TRAIN.**—One is not a passenger entitled to free transportation on a train because of stock carried thereon if he merely had a verbal agreement to buy some of the stock when the train reached a certain station, and then only if he could give the security required; had no contract with the railroad company; neither saw the agent of the company, nor went near him when the contract for the carriage of the stock was made; and his name was not mentioned to the agent, nor inserted in the bill of lading. *Richmond etc. R. R. Co. v. Burnsed*, 656.

18. **DUTY TO TRESPASSERS ON TRAINS.**—A railroad company is not answerable to a trespasser on a train for negligence, and owes him no duty other than that of doing him no wanton or willful injury. *Richmond etc. R. R. Co. v. Burnsed*, 656.

19. **MASTER AND SERVANT—CONNECTING CARRIERS—FELLOW-SERVANTS.**—When the delivery of goods to a connecting carrier is not intended to take place at a point where two railroads meet, but in the yards of the connecting carrier beyond such point the operation of trains by the delivering carrier in the yards of the connecting carrier is not the performance of a duty required of the latter company. The employees of the two companies in such yards are not fellow-servants so as to relieve the delivering carrier from liability for negligence in injuring an employee of the connecting carrier. *Vannatta v. Central R. R. Co.*, 823.

20. **MASTER AND SERVANT—NEGLECT OF CONNECTING CARRIER—FELLOW-SERVANTS.**—A car inspector employed by a connecting carrier and at work in its railroad yard is not also the employee of another carrier delivering a car in such yard for transportation by the connecting carrier, especially when the delivery of such car has been completed by placing it upon the siding of the connecting carrier as is customary in the usual course of business between the two companies, and the train hands delivering it have started back, but upon discovering that it is not fully upon the siding, return and move it, thus injuring such car inspector. The employees of the two companies are not fellow-servants, and the delivering carrier is liable for the negligence of its employees. *Vannatta v. Central R. R. Co.*, 823.

21. **A RAILROAD COMPANY IS BOUND TO FURNISH SUITABLE SWITCHES** and competent servants to operate them, but the actual operation of the switches is a duty belonging to the employees of the company, and for the negligent performance of that duty by one servant, to the injury of another employed in the same general business, the company cannot be held liable. Such negligence is not a violation of the master's duty to provide his servants with a safe place of work. *Daves v. Southern Pac. Co.*, 113.

22. **DUTY TO PROVIDE SAFE APPLIANCES AND SELECT COMPETENT SERVANTS.**—The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery

and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of employees as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employee in his contract of employment. *Doss v. Southern Pac. Co.*, 113.

23. **FIRE CAUSED BY SPARKS—BURDEN OF PROOF.**—In an action to recover for the loss of property by fire alleged to have been caused by sparks escaping from one of two locomotives belonging to a railroad company, the burden of proof is upon the plaintiff to show by a preponderance of proof that the fire was communicated by one of the locomotives as alleged, and proof of a mere possibility that it came from such source is not sufficient. *Inman v. Elberton etc. R. R. Co.*, 232.
24. **LIABILITY FOR FIRE CAUSED BY SPARKS.**—When, in an action to recover for the loss of property by fire alleged to have been caused by the escape of sparks from one of two railroad locomotives, it is shown that the fire was communicated from one of them, still the company is not liable if it exercised all reasonable care and diligence in keeping such locomotives in proper condition, as well as in properly managing and operating them at the time and place in question. *Inman v. Elberton etc. R. R. Co.*, 232.
25. **FIRE CAUSED BY SPARKS—EVIDENCE OF NEGLIGENCE.**—In an action to recover for loss by fire alleged to have been caused by the escape of sparks from one of two particular railroad locomotives, evidence that other locomotives belonging to the same company had at other times emitted sparks at or near the place of the fire in question is not admissible to show negligence on the part of the company. *Inman v. Elberton etc. R. R. Co.*, 232.
26. **FIRE CAUSED BY SPARKS—EVIDENCE OF NEGLIGENCE.**—When, in an action to recover for loss by fire caused by the escape of sparks from a railroad locomotive, the locomotive which caused the fire cannot be fully identified, evidence that the company's locomotives frequently emitted sparks on former occasions near the time of the fire in question is generally relevant and competent to show habitual negligence on the part of the company, but when the locomotive alleged to have caused the fire is identified, evidence as to the condition of other locomotives and of their causing fires is clearly irrelevant and inadmissible. *Inman v. Elberton etc. R. R. Co.*, 232.
27. **FIRE CAUSED BY SPARKS—ERRONEOUS INSTRUCTIONS NOT REQUIRING REVERSAL OF JUDGMENT.**—When the controlling issue in a case is whether or not the fire complained of originated from sparks emitted by a particular railroad locomotive, and the evidence shows clearly that it did not so originate, and consequently that the defendant is not liable, instructions based upon the hypothesis of negligence on the part of the plaintiff as causing the loss, though not authorized by the evidence, will not require a reversal of the judgment when the verdict is manifestly right. *Inman v. Elberton etc. R. R. Co.*, 232.

See ATTACHMENT, 2; CARRIERS; MASTER AND SERVANT, 3; NEGLIGENCE.

RAPE

See SEDUCTION, 4.

RATIFICATION.

See WILLS, 8.

REAL PROPERTY.

1. **GROWING TREES** are part and parcel of the land on which they grow. Therefore a deed purporting to pass title to all the merchantable timber of certain dimensions on an entire homestead, and specifying no definite time for its removal is a conveyance of an interest in the land and invalid unless the wife joins in its execution. *McKensie v. Showe*, 654.
 2. **ACCRETIONS.**—A LANDOWNER IS ENTITLED TO LANDS WHICH ARE ADDED TO HIS THROUGH THE OPERATION OF FLOODS and of changes in the channel of a river, occurring in several different years, though the greater portion was added in a single year, and that it was being so added could be seen at the time. The terms of "alluvion," on the one hand, and "gradual and imperceptible" accretion, on the other, are used to contradistinguish the sudden disruption of a piece of ground from one man's land to another, which may be followed and identified, from that increment which slowly or rapidly results from floods, but which is utterly beyond the power of identification. The length of time during formation is not material. *Coulthard v. Stevens*, 304.
 3. **HIGHWAYS—RIGHTS OF ABUTTING OWNERS.**—Every owner of a lot abutting on a public street has an easement for the free admission of light and air, and for ingress and egress to and from the property. *Gans etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 706.
- See ASSIGNMENT FOR BENEFIT OF CREDITORS, 7; CORPORATIONS, 28; HUSBAND AND WIFE, 3; TAXES, 1.

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See CHATTEL MORTGAGES; JURISDICTION, 2; NOTICE, 1-3.

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REPAIRS.

See INSURANCE, 7, 8.

REPLEVIN.

1. **INCONSISTENT DEFENSES.**—If a minor places a person in possession of property by a bill of sale, and afterwards, upon the refusal of his demand for its restitution, brings replevin for its recovery, the defendant, having interposed a general denial of the plaintiff's right to the property, is precluded from subsequently changing his position, and relying upon the fact that the action had been brought before the formal repudiation of the contract of sale, or upon the failure of the plaintiff to tender certain storage charges upon the property claimed at the time when he made the demand for its restitution. *George v. Hewlett*, 626.
2. **DESTRUCTION OF PROPERTY, WHEN NOT ADMISSIBLE AS A DEFENSE.**—If the defendant, in an action of replevin, obtained possession of the subject matter of the litigation by executing a forthcoming bond, the subsequent destruction of the property by fire, though without any fault or negligence on his part, does not relieve him from liability. *George v. Hewlett*, 626.

See EXECUTION, 5.

REPUBLICATION.

See WILLS, 8, 22-26.

REPUGNANCY.

See STATUTES, 12.

RESCISSION.

See CORPORATIONS, 12, 20; SALES, 1, 3-5.

RES GESTÆ.

See EVIDENCE, 10; WILLS, 11.

RESIGNATION.

See OFFICERS, 5-7.

RETAXING.

See COURT, 2.

RETURN.

See EXECUTION, 6-8; TRESPASS, 2.

REVERSIONS.

See ESTATES; HOMESTEAD, 2; PARTITION, 4, 5.

REVOCATION.

See ARBITRATION, 5-7; HUSBAND AND WIFE, 10; WILLS, 22, 23.

ROBBERY.

1. **TO CONSTITUTE ROBBERY** there must be force or intimidation, asportation without the consent of the owner, and an intent to steal. Hence when a person takes property from another under a *bona fide*

claim of right, and for the purpose of applying it to the payment of a debt due from the latter, the crime of robbery is not committed. It is otherwise if the claim of right is a mere pretense, and when the question whether or not such claim is *bona fide*, or a mere pretense, is in doubt it should be submitted to the jury for determination. *Cranford v. State*, 242.

2. **TO CONSTITUTE ROBBERY** it is not necessary that the taking should be directly from the person of the owner. It is sufficient if it is done in his presence, against his will, by violence or putting him in fear. *Cranford v. State*, 242.

See **HOMICIDE**, 6.

RULES.

See **RAILROADS**, 6, 11-14.

SALES.

1. **WARRANTY, WHERE PARTY ACTS UPON HIS OWN JUDGMENT.**—One who examines an article himself and relies on his own judgment, may at the same time protect himself by taking a warranty, and, if the warranty proves false, may rescind. *Smith v. Hale*, 485.
2. **WARRANTY—PROOF OF RELIANCE UPON.**—An instruction that the jury must find against the party relying upon a warranty, unless in the case there was oral testimony from him of his reliance thereon, is properly refused if, from the other evidence, the jury might well find that he did rely on the warranty, though in his testimony he did not say so in express terms. *Smith v. Hale*, 485.
3. **RESCISSION.—A BREACH OF WARRANTY** upon a sale of personal property authorizes the purchaser to rescind the contract and return the article, although there was no express agreement to that effect, and no fraud. *Smith v. Hale*, 485.
4. **RESCISSION—RIGHT TO ENTER UPON LAND TO RECLAIM PROPERTY.**—If one of the parties to an exchange of personal property having the right to rescind elects to do so, and demands the return of the property received by the other party, on whose premises it is, a refusal of such demand justifies an entry on such premises for the purpose of taking and carrying away the property so demanded. *Smith v. Hale*, 485.
5. **RESCISSION BY OFFERING TO RETURN ARTICLE AFTER IT IS BROKEN.**—If one who exchanges a buggy warrants it will carry a specified weight, and one of the springs upon the buggy being subjected to such weight breaks, the fact that the spring is so broken does not defeat the right to return the buggy and rescind the contract. *Smith v. Hale*, 485.

See **AUCTIONS**; **BAILMENT**, 4; **CHATTEL MORTGAGES**; **EXECUTION**; **FRAUD**; **HOMESTEAD**, 1, 2, 4, 5; **JUDICIAL SALES**; **REPLEVIN**, 1; **TRUSTS**, 13-15.

SATISFACTION.

See **EXECUTION**, 2.

SCHOOL-FELLOWS.

See **ASSAULT**.

SCHOOLS.

See **TAXES**, 2.

SECRETARY OF STATE.

See COURTS, 2.

SEDUCTION.

1. **DEFINITION OF.**—The word “seduction,” when applied to the conduct of a man towards a female, means the use of some influence, promise, art, or means on his part by which he induces the woman to surrender her chastity and her virtue to his embraces. There must be something more than a mere reluctance on the part of the woman to commit the act. It must also appear that her consent was obtained by flattery, false promises, artifice, urgent importunity, based on professions of attachment or the like for the woman, and that, relying solely on such flattery, false promises, artifice, and importunity, she surrendered her person and her chastity to her alleged seducer. *Marshall v. Taylor*, 144.
2. **SEDUCTION BY MARRIED MAN.**—THE VIOLATION OF A PROMISE OF MARRIAGE is not one of the necessary constituents of seduction. The injury may be complete even though the female knows that her seducer is a married man. *Marshall v. Taylor*, 144.
3. **EVIDENCE IS SUFFICIENT TO SUPPORT A VERDICT FOR THE PLAINTIFF** when it is shown that she was a chaste girl, making her living far distant from her few friends, stopping at night alone in a cottage; that she was visited after dark by her employer, a man of wealth and mature years, with whom she was on friendly terms; that after a conversation upon ordinary topics, lasting some time, he gave her a glass of wine, by the drinking of which her mind was seriously affected; that he expressed affection for her, repeatedly caressed her, made promises of future friendship and assistance; and that, after all these things had been going on some length of time, he debauched her. Such facts do not disclose a cold, deliberate transfer of virtue for a consideration, nor a sacrifice of virtue under the promptings of lustful passion. *Marshall v. Taylor*, 144.
4. **PROOF THAT DEFENDANT WAS GUILTY OF RAPE WILL NOT DEFEAT ACTION FOR.**—An action by a female to recover damages for her seduction cannot be defeated by showing that she was unconscious at the time the sexual intercourse took place, and that the defendant was therefore guilty of rape. *Marshall v. Taylor*, 144.
5. **SEDUCTION—DAMAGES HELD NOT EXCESSIVE.**—A verdict for twenty-five thousand dollars, in an action by a chaste, unmarried female for her seduction, is not so excessive as to be a ground for a new trial, when it appears that the plaintiff is a young and inexperienced girl, and the defendant a man of mature years and large means. *Marshall v. Taylor*, 144.

SEEPAGE.

See WATERS, 1, 5.

SEPARATE PROPERTY.

See HUSBAND AND WIFE, 1, 4, 5, 7, 11.

SERVICES.

See DAMAGES; PARENT AND CHILD.

SERVITUDES.

See HIGHWAYS; RAILROADS, 1.

SETOFF

See MORTGAGES, 6.

SEVERABLE.

See CONTRACTS, 5.

SHERIFFS.

See TRUSTS, 15.

SPECIFIC PERFORMANCE.

See CONTRACTS, 1; CORPORATIONS, 10, 23; EQUITY, 2.

STATES.

See ATTACHMENT, 2, 3; CONFLICT OF LAWS; CONTRACTS, 1; CORPORATIONS, 4; COURTS, 1; EXTRADITION.

STATUTES.

- 1. CONSTITUTIONAL LAW—SUBJECT MATTER OF STATUTE EXPRESSED IN ITS TITLE.**—When the title of an act creating a new city charter and consolidating and declaring the “rights and powers of said corporation, and for other purposes,” affords no indication of any extension of police power beyond the corporate limits, such act is unconstitutional in so far as it provides for extending and exercising police jurisdiction over certain territory adjacent to, but outside the limits of, such city. Under such statute a city police officer has no more power than a private person to make arrests on such territory, and under the code of Georgia he has no power to arrest for the use of abusive language addressed to himself tending to cause a breach of the peace. *Blair v. State*, 206.
- 2. EXEMPTION LAWS, CONSTRUCTION OF.**—The beneficial intention of the legislature in the enactment of exemption statutes must not be defeated by strained or technical constructions thereof. *Elliot v. Hall*, 285.
- 3. CONSTRUCTION OF.—RE-ENACTMENT OF A PROVISION** of a former statute does not carry with it the construction placed by the courts upon such provision, unless the rules of statutory construction are the same at the date of both enactments. *Dixon v. Pluna*, 180.
- 4. CONSTITUTIONAL LAW—VALIDITY OF APPORTIONMENT ACT IS JUDICIAL QUESTION.** — In an action to enjoin the secretary of state from issuing or publishing notice of election of members of the legislature under an apportionment act alleged to be invalid, the question of its validity is judicial, not political. *State v. Cunningham*, 27.
- 5. CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—INEQUALITY.**—In an action to test the validity of a legislative apportionment statute, the fact that inequality of representation under it is not greater than under former apportionment acts is irrelevant and immaterial when the language of the state constitution securing equality is plain and unambiguous. *State v. Cunningham*, 27.
- 6. CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—INEQUALITY.**—When a legislative apportionment statute contains such a wide and bold departure from a constitutional mandate requiring equality of popula-

tion in each district that it cannot possibly be justified by the exercise of any judgment or discretion on the part of the legislature enacting it, and evinces an intention to utterly ignore and disregard the constitutional rule in order to promote some other object than a constitutional apportionment, the conclusion is inevitable that the legislature did not exercise its judgment or discretion in accordance with constitutional duty and obligation, and the statute will be declared void. *State v. Cunningham*, 27.

7. **CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT—INEQUALITY.**—A legislative apportionment statute which forms one senate district from two assembly districts having a certain number of inhabitants, and another such district from four assembly districts having more than twice that number of inhabitants, is void as being in violation of constitutional provisions that the members of the senate shall be apportioned according to the inhabitants, if the only impediment to securing equality of representation is the constitutional requirement that senators shall be chosen by single districts of convenient contiguous territory, and no assembly district shall be divided in the formation of a senate district. A like inequality in representation in forming assembly district will, in like manner, render such act void. *State v. Cunningham*, 27.
8. **CONSTITUTIONAL LAW—LEGISLATIVE APPORTIONMENT.**—When a statute, apportioning a state into senate and assembly districts complies with constitutional provisions that the assembly districts are to be bounded by county, precinct, town, or ward lines, to consist of contiguous territory, and to be in as compact a form as practicable, and that the senate districts are to be of convenient contiguous territory, no assembly district to be divided in the formation thereof, it is nevertheless void if it does not attempt to comply with the further constitutional requirement that such apportionment shall be according to the number of inhabitants. *State v. Cunningham*, 27.
9. **CONSTITUTIONAL LAW—UNCONSTITUTIONAL STATUTE.**—WHEN MUNICIPAL WORK has been done by virtue of municipal authority and in strict conformance with an existing statute, the legality of such work cannot be questioned after its completion because the statute under which it was done has since been judicially declared unconstitutional. *King v. Philadelphia Co.*, 817.
10. **CONSTITUTIONAL LAW—WORK DONE UNDER UNCONSTITUTIONAL LAW.** Acts done by public officers under statutory authority are valid, although such statute is subsequently declared void. *King v. Philadelphia Co.*, 817.
11. **POLICE POWER—THE BUSINESS OF CONDUCTING A PRIVATE ASYLUM**, in which proper care can be given to insane persons who are not dangerous to themselves or others by a member of the medical profession having experience and special skill in the treatment of such cases is a necessary and humane one; and the right to maintain such an asylum, and to practice this particular branch of the medical profession, cannot be prohibited nor burdened with unreasonable and oppressive conditions which virtually amount to its prohibition. *Ex parte Whitwell*, 152.
12. **REPUGNANCY OF.**—A statute imposing a penalty of the amount of the judgment and costs and ten per cent damages for the failure to return an execution and a prior statute imposing for the failure to return an execution on or before the return day thereof a penalty of the

whole amount of the money in such execution specified; are not so plainly repugnant that one must give place exclusively to the other. The one applies to an entire failure to return the writ, and the other to a failure to return it on or before its return day. Therefore if the return is made before the action is brought, though after the return day, the recovery cannot include the ten per cent penalty. *Hawkins v. Taylor*, 82.

See ARREST, 2; CONTRACTS, 6, 8-10; CORPORATIONS, 2, 3, 10; COSTS; CO-TENANCY, 4, 6; EVIDENCE, 5; HUSBAND AND WIFE, 4, 7, 10; LIMITATIONS OF ACTIONS; MECHANIC'S LIEN, 1, 6, 11, 18; MUNICIPAL CORPORATIONS, 7, 14; OFFICERS, 4; TAXES, 3, 4; WILLS, 28.

STOCK.

See ATTACHMENT, 5-7; BAILMENT, 3; CORPORATIONS, 10-14, 18, 22; NEGOTIABLE INSTRUMENTS, 10.

STOCKHOLDERS.

See CORPORATIONS, 2, 14, 16, 18-20.

STREETS.

See EMBOWMENT, 2; EMINENT DOMAIN; HIGHWAYS; RAILROADS, 1-3; REAL PROPERTY, 3.

STREET RAILROADS.

See MUNICIPAL CORPORATIONS, 5-7.

SUBROGATION.

1. THE LOAN OF MONEY TO A DEBTOR to discharge his obligation does not entitle the lender to be subrogated to securities which the creditor held for the enforcement of the obligation. *Riggin v. Hilliard*, 113.
2. VOLUNTARY PAYMENT BY MISTAKE OF LAW.—If a mortgagor and mortgagee of a homestead mortgaged for money with which to pay off a prior mortgage labor under a mutual mistake in supposing that the homestead belongs to the mortgagor in fee, under her husband's will, to the exclusion of her minor children, equity will not grant relief by subrogating such mortgagee to the rights of the prior mortgagee. *Kleimann v. Gieselmann*, 761.
3. VOLUNTARY PAYMENT.—One who has no interest in land subject to a mortgage, and who advances money to the mortgagor with which the mortgage debt is satisfied, is a mere volunteer, not entitled to be subrogated to the rights of the mortgagee. *Kleimann v. Gieselmann*, 761.
4. VOID JUDICIAL SALES.—Purchasers under a void judicial sale are entitled to be subrogated to the rights of the creditors whose claims were discharged by the proceeds of such sale. *Bond v. Montgomery*, 119.
5. JUDICIAL SALES.—A PURCHASER AT A VOID JUDICIAL SALE is not entitled to be subrogated to the claims of creditors, unless it appears that the proceeds of the sale were appropriated to the payment of such claims. *Bond v. Montgomery*, 119.
6. JUDICIAL SALES.—A PURCHASER AT AN ADMINISTRATOR'S SALE OF A HOMESTEAD IS NOT IN PARI DELICTO with the administrator and therefore excluded from the benefit of the right to be subrogated to the claims of creditors, on the ground that the sale by the administrator was, under the circumstances, forbidden by statute and made punishable as a mis-

demeanor, nor does the fact that the purchaser acted as one of the appraisers of the homestead preparatory to its sale deprive him of his right to subrogation. *Bond v. Montgomery*, 112.

See PARTIAL.

SUBSCRIPTIONS.

See CORPORATIONS, 11-12.

SUMMONS.

See PROCESS.

SUNDAY.

See EXECUTION, 7.

SUPREME COURT.

See COURTS.

SURETYSHIP.

1. A SECURITY TAKEN BY ONE OF SEVERAL SURETIES, bound by the same instrument, for his indemnity against loss, inures to the benefit of all, though it is received before any of them become liable, and without any agreement that the others shall participate in its benefits. *Hoover v. Mowrer*, 293.
2. IF ONE OF SEVERAL SURETIES TAKES SECURITY from his principal for his indemnity, he is entitled, in an accounting with his cosureties, for the proceeds of such security, to be credited with the expenses necessarily incurred in its protection and enforcement. *Hoover v. Mowrer*, 293.
3. A SURETY TAKING FROM HIS PRINCIPAL SECURITY AGAINST LOSS, IN ACCOUNTING FOR THE PROCEEDS THEREOF to his cosureties, is not entitled to deduct the amount of a debt due to him from his principal. *Hoover v. Mowrer*, 293.
4. RELEASE OF BY CHANGE OF PAYEE.—If a surety signs a note payable to A, who declines to receive it, and it is then negotiated to B, such change in the payee, if made without the knowledge or consent of the surety, releases him from liability. *Jones v. Benson*, 899.

See NEGOTIABLE INSTRUMENTS, 8.

SURFACE WATERS.

See WATERS, 1-4.

SURVEYS.

See DEEDS, 4, 5.

SURVIVORSHIP.

See COTENANCY, 10.

SWALES.

See WATERS, 3.

TAX DEEDS.

See TAXES, 4, 5.

TAXES.

1. **REAL ESTATE, WHAT TAXABLE AS.**—Under a statute providing that real estate shall be assessed in the town where it lies, and defining real estate as including all lands and all buildings erected or affixed to the same, and lands as including all tenements and hereditaments connected therewith, and all rights thereto, and all interests therein, aqueducts, conduits, pipes, and hydrants used to distribute water among the citizens of a town, though supplied by a pumping station and reservoir in another town, are assessable and taxable as real estate in the town in which they are situate. *Paris v. Norway Water Co.*, 371.
2. **AN ASSESSMENT OF PUBLIC SCHOOL PROPERTY FOR LOCAL IMPROVEMENTS IS NOT AUTHORIZED** by a statute which, in general terms, requires the assessment to be upon all real property situate in the district. *Board of Improvement v. School District*, 108.
3. **TAX CERTIFICATES.**—If an assignee of a tax certificate indorses his agreement thereon that he will not procure a deed for the premises, or some part thereof, every assignee under him is bound by such agreement, and precluded from obtaining or enforcing a conveyance in violation thereof. *Soukup v. Union Investment Co.*, 317.
4. **TAX DEEDS.**—It will be presumed that notice of the expiration of the time for redemption was properly served, when a tax deed has issued, and the statute makes it *prima facie* evidence of the regularity of all proceedings prior to its execution. *Soukup v. Union Investment Co.*, 317.
5. **TAX DEEDS—DESCRIPTION.**—"West part, northeast quarter, northwest quarter, twenty acres," section 36, is a sufficient description, because it is equivalent to the west twenty acres, or the west half the forty-acre tract. *Soukup v. Union Investment Co.*, 317.

See COTENANCY, 5.

TENANTS IN COMMON.

See COTENANCY.

THREATS.

See HOMICIDE, 4.

TONTINE ASSIGNMENT.

See INSURANCE, 16.

TORTS.

See DAMAGES, 4.

TREES.

See REAL PROPERTY, 1.

TRESPASS.

1. **PROCESS, OFFICER, WHEN MAY JUSTIFY UNDER.**—One who seizes the property or arrests the person of another by legal process or other equivalent authority conferred by law can only justify himself by a strict compliance with such process or authority. If he fails to execute or return the process as thereby required, he stands as if he never had any

authority to take the property, and therefore appears to have been a trespasser from the beginning. In this respect there is no difference between civil and criminal process. *Boston etc. R. R. v. Small*, 379.

2. **PROCESS—OFFICER BECOMING TRESPASSER AB INITIO.**—Acts of omission may expose an officer to liability as a trespasser *ab initio*. The dictum of the Six Carpenters' case that "Not doing cannot make a party who has authority or license by law a trespasser *ab initio*, because not doing is no trespass" disapproved. *Boston etc. R. R. v. Small*, 379.
3. **PROCESS, FORFEITTING PROTECTION OF BY MAKING A FALSE RETURN.**—If an officer acting under a warrant commanding him to search in a freight car for intoxicating liquors, and, if found, to safely keep the same with the vessels in which they are contained until final action and decision be had thereon, finds such liquor and, believing it not to be intended for unlawful sale, falsely returns that he made the search and found no liquor he thereby forfeits the protection of his process and becomes answerable in an action of trespass for breaking into the car while executing his warrant. *Boston etc. R. R. v. Small*, 379.
4. **LANDLORD IS LIABLE AS A TRESPASSER AB INITIO** if he causes a warrant of distress to be levied on goods in possession of his tenant which he knows do not belong to the latter but have been left with him to sell upon commission. *Brown v. Stackhouse*, 908.

See ANIMALS, 2, 3; ARREST, 5; HOMICIDE, 7, 8.

TRESPASSERS.

See RAILROADS, 18; TRESPASS.

TRIAL.

1. **A DEMURRER TO THE EVIDENCE** admits every fact which may fairly be inferred therefrom. *Patton v. Bragg*, 730.
2. An instruction to a jury which incorrectly or inadvertently uses a word will not require the reversal of the judgment if the law was plainly and correctly stated in several other instructions. *Tagg v. McGeorge*, 889.
3. **PERSONAL EXAMINATION OF PLAINTIFF—POWER OF COURT TO ORDER.**—In an action to recover for personal injury, the court may require the plaintiff to submit to a personal examination by a physician, in the presence of the jury, of that portion of his body alleged to have been injured, when this can be done without shocking anyone's sense of delicacy; but a wide discretion is vested in the trial court, which justifies a refusal to require the examination when the necessities of the case are not such as to call for it, or when the sense of delicacy of the plaintiff may be offended by the exhibition, or when the testimony would be merely cumulative, or in the judgment of the trial court, would not materially aid the jury. *Graves v. Battle Creek*, 561.
4. **CHANCE VERDICT, WHAT IS.**—A verdict arrived at by taking the average of such sums as the individual jurors shall deem to be adequate under the circumstances will be set aside, as being a chance verdict, if it appears that the amount thus obtained has been adopted in pursuance of a previous agreement that it was to represent the verdict, and not as the result of due consideration on the part of the jury and a determination that it was a just and proper verdict. *Dixon v. Platts*, 180.
5. **PRODUCTION OF WITNESSES.**—In the trial of a criminal case the prosecution is not bound to call all witnesses present at the difficulty and in court at the time of the trial. *Blair v. State*, 206.

See APPEAL; ARBITRATION; ARREST, 8; EVIDENCE, 2, 6, 7; HABEAS CORPUS; HOMICIDE, 9; INNKEEPERS, 1, 2; NEGLIGENCE, 3, 4; NEW TRIAL; PAYMENT, 1; ROBBERY, 1.

TROVER.

CHATTEL MORTGAGE—BREACH OF CONDITION BY REMOVAL OF PROPERTY.—

One is guilty of a conversion of mortgaged chattels, if he removes and sells them, the mortgage giving the mortgagee the right to take possession of the property upon its removal or sale. *National Bank v. Morris*, 754.

TRUSTS.

1. DECLARATIONS OF, WHEN EFFECTUAL TO PASS AN EQUITABLE TITLE.—

An unequivocal declaration by the owner of property, that he holds it in trust for the benefit of a designated donee vests in such donee an absolute equitable title, although he is not informed of the trust, and the memorandum relied on is not delivered to anyone as a declaration of trust. *Janes v. Falk*, 783.

2. A COMPLETE AND IRREVOCABLE TRUST IS ESTABLISHED by the executor

and trustee of an estate, when after converting to his own use certain assets of such estate he places in a box among other papers relating to the estate a policy of insurance upon his own life, with a letter stating that the policy is collateral security for the payment of his indebtedness to the estate, and does thereafter not regard the policy as his individual property, but as being held in trust for the estate, the evidence being that the persons interested in the estate were on several occasions informed, through their representatives and counsel, that he had disposed of some of the securities belonging to the estate, but had secured the estate by substituting this insurance policy, and held the policy for the benefit of the estate, and that after his removal from the executorship and the appointment of an administrator, the policy was formally assigned and duly delivered to the latter. *Janes v. Falk*, 783.

3. PRECATORY TRUSTS.—No particular form of expression is requisite to

create a precatory trust. Words of recommendation, request, entreaty, wish or expectation will impose a binding duty on a devisee or legatee by way of trust, provided the testator has pointed out, with sufficient clearness and certainty, the subject matter and the object of the trust; nor will the fact that the testator's whole estate is disposed of in absolute terms, before the precatory words occur in the instrument, prevent the trust from attaching. *Murphy v. Carlin*, 699.

4. WILLS—PRECATORY TRUSTS, WHEN DEEMED TO EXIST.—In determining

whether a precatory trust is raised by a will, the essential point is, whether, looking at the whole contents of the instrument, it should be inferred that the testator intended to impose an obligation on his devisees or legatees to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to them to carry out such wishes or not at their discretion. *Murphy v. Carlin*, 699.

5. WILLS, CONSTRUCTION OF—PRECATORY TRUSTS—EXPRESSIO UNIVS EST

EXCLUSIO ALTERIUS.—A precatory trust is created by the following clause in a will: "It is my wish and desire that my wife continue to provide for the care, comfort, and education of T. J. M., now aged nearly five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case of her death, providing that he continue to be a dutiful child to her and shows himself worthy of such consideration." *Murphy v. Carlin*, 699.

6. **TRUST PROPERTY EMBARKED IN TRADE IS PRIMARILY LIABLE TO CREDITORS** for debt, and will be applied as far as it will go to such liabilities. *Woddrop v. Weed*, 832.
7. **TRUST ESTATES—INSOLVENCY OF—CONVEYANCE AND CONFESSION OF JUDGMENT IN FAVOR OF OUTLAWED CLAIMS.**—When a trust estate has been embarked in business under a power contained in a will authorizing the executor as trustee to carry on and control such business and if advisable to sell the estate and invest the proceeds for the benefit of the *cestuis que trust*, the trustee has no power, after both the estate and himself have become insolvent, to convey the bulk of it to its creditors whose claims have expired by limitation, and who have knowledge of the terms of the will and of such insolvency, nor can he confess judgment in their favor so as to prefer them over other creditors of the estate. Such conveyance and judgment are void for want of consideration as against the other creditors, and cannot operate as a waiver of the statute of limitations so as to restore the lien of such expired claims. *Young v. Weed*, 839.
8. **TRUST ESTATES—INSOLVENCY OF—PREFERENCES BY CONFESSION OF JUDGMENT.**—When a trust estate embarked in business under a power in a will has become insolvent after the rights of creditors have intervened, the estate should be held intact for distribution amongst them according to their respective rights. The trustee has no right to confess judgments with intent to prefer certain creditors. Such judgments are void. The unpreferred creditors have a right in equity to compel the trustee and the preferred creditors to account. *Woddrop v. Weed*, 832.
9. **TRUST ESTATES—INSOLVENCY OF—RIGHTS OF CREDITORS—PREFERENCE.** When a trust estate embarked in business under a power contained in a will has become insolvent, and the trustee is also insolvent, he becomes a trustee for its creditors, and as such is bound to protect all their rights and preserve the estate for distribution among them according to their respective rights. He has no right to give a preference to any of them. *Woddrop v. Weed*, 832.
10. **TRUST ESTATES—FRAUDULENT TRANSFER BY TRUSTEE.**—When a trust estate embarked in business under a power contained in a will has become insolvent, all of its creditors, as to the trustee, occupy the position of *cestuis que trust*, and as such are entitled to equitable relief from an illegal and unwarranted transfer of the trust estate made by him to their injury. *Young v. Weed*, 839.
11. **RIGHT OF TRUSTEE TO DELEGATE HIS POWERS.**—The duty and power of a trustee cannot be delegated unless there is express authority for that purpose given in the instrument creating the trust. *Woddrop v. Weed*, 832.
12. **DELEGATION OF POWER BY TRUSTEE—ASSIGNMENT FOR BENEFIT OF CREDITORS.**—When a trust estate embarked in business under a power contained in a will has become insolvent, the trustee has no right to execute an assignment of such estate for the benefit of creditors. *Woddrop v. Weed*, 832.
13. **TRUSTEE'S SALE MADE AT UNUSUAL HOUR** will be vacated if the agent of a party interested in the sale, being instructed to bid in the property for the amount of the debt, was on his way to the place of the sale, and would have arrived in time to take part therein if it had not been held prematurely; and the price realized represented scarcely more than one-fourth of the real value of the property. *Holdsworth v. Shannon*, 719.

14. JUDICIAL AND TRUSTEE'S SALES.—INADEQUACY OF PRICE, without more, unless so gross as to shock the moral sense, is insufficient to invalidate a sale either under a deed of trust or upon foreclosure or execution. *Holdsworth v. Shannon*, 719.

15. TRUSTEE'S SALE MADE BEFORE CUSTOMARY HOUR will not be sustained because the sheriff, who acted for the trustee, had other pressing duties to attend to, and therefore made the sale before the customary hour. *Holdsworth v. Shannon*, 719.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 4, 7, 15; **CHARITIES**; **HUSBAND AND WIFE**, 1, 2, 5, 9; **INSURANCE**, 17.

ULTRA VIRES.

See CORPORATIONS, 21-27.

UNDUE INFLUENCE.

See WILLS, 3, 8-12, 14-21.

VENDOR AND PURCHASER.

See MECHANIC'S LIEN, 4, 5.

VERDICT.

See HABEAS CORPUS; **SEDUCTION**, 5.

VESTED RIGHTS.

See MECHANIC'S LIEN, 18.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 2-4.

VOLUNTEER.

See SUBROGATION, 3.

WAGES.

See ATTACHMENT, 2; **EXECUTION**, 9; **FRAUDULENT CONVEYANCES**, 6.

WAGERS.

See INSURANCE, 14-16.

WAIVER.

See ACTIONS; **MECHANIC'S LIEN**, 13-18; **MISTAKE**, 2, 3; **NEGOTIABLE INSTRUMENTS**, 1; **PROCESS**, 3; **TRUSTS**, 7.

WARRANTS.

See ARREST, 1-5.

WARRANTY.

See SALES, 1-3, 5.

WATERS.

1. SURFACE WATERS, WHAT ARE.—WATERS COMPOSED PARTLY OF SURFACE WATER ESCAPING THROUGH A LEVEE BY PERCOLATION and partly of rainfall are subject to the rules in regard to surface waters. *Gray v. McWilliams*, 163.

2. **SURFACE.—IF BY THE FLOW OF SURFACE WATERS THROUGH A SWALE A DITCH HAS BEEN CUT** in the bottom thereof the owner of the land has no right to dam up such ditch if thereby he injures the owner of another tract by retarding the flow of the water in drains placed in the swale on the lands of such other owner. *Wharton v. Stevens*, 297.
3. **IF SURFACE WATER FLOWS BY A WELL-DEFINED COURSE, BE IT IN A DITCH OR SWALE**, in its primitive condition, and seeks discharge in a neighboring stream, its flow cannot be retarded or interfered with by a landowner to the injury of neighboring proprietors. *Wharton v. Stevens*, 297.
4. **EASEMENTS—DISCHARGE OF SURFACE WATERS.**—The owner of the higher of two adjoining tenements has an easement to have all waters falling or accumulating on his land discharged over the lower tenement, to the same extent as they would be discharged in a state of nature; and this natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment of the dominant proprietor. *Gray v. McWilliams*, 163.
5. **WATERS, SEEPAGE, RIGHT TO RESTRAIN FLOW OF.**—If waters seep through a levee and come to the surface much as springs do, and gradually seek a lower level, not in a defined channel, but as surface water is wont to do, by percolation and force of gravity, they should be allowed to pass off by the methods devised by nature, and an embankment or levee erected by the owner of lower land to hold such water back and to cause it to be retained or to flow upon the higher land may, at the instance of the owner of the latter, be abated as a nuisance. *Gray v. McWilliams*, 163.
6. **RIGHT OF LANDOWNER TO PROTECT HIMSELF AGAINST OVERFLOW FROM RIVER.**—If the owner of higher land upon a river subject to overflow fails to erect levees or embankments to protect his land from the effect of floods, his neighbor owning land in his rear may protect himself from such floods by erecting a levee upon his own land, although the effect thereof may be to increase the flood waters on the higher land of the neighbor who has not resorted to like means of protection. *Gray v. McWilliams*, 163.
7. **UNLAWFUL DIVERSION OF AND INTERFERENCE WITH.**—The owner of a watercourse may divert or change the course of the stream on his own land, provided he returns it to its original or natural channel before it reaches the land of an adjoining owner without injury to the latter; but the former must not, by changing the direction of the flow of the stream, so increase or diminish its velocity as to cause damage to the land of the adjoining proprietor, or impair his rightful use of the stream; nor can he make any change or diversion of the stream, though on his own land, which would cause the washing of mud and debris on the land of his neighbor, to the injury of the latter, and which would not have occurred but for the change in the current of the stream. *Kay v. Kirk*, 408.

See INJUNCTIONS, 3-5.

WILLS.

1. **INTENT OF TESTATOR GOVERNS.**—A court can best ascertain the true intent and meaning of a testator by putting itself, as far as may be in his place, and reading all the directions of his will in the light of his environment at the time it was made. When that intent and meaning can be in this way clearly ascertained, all technical rules and adjudi-

- ated cases in other jurisdictions standing in the way of its execution must be disregarded. *Murphy v. Carlin*, 699.
2. **PROOF OF EXECUTION** of a will must be made by two witnesses, each of whom must separately depose as to all facts necessary to complete the chain of evidence, so that no link of it may depend on the credibility of but one witness. *Simrell's Estate*, 864.
 3. **TESTAMENTARY CAPACITY—UNDUE INFLUENCE.**—EVIDENCE that the contestants of a will had twenty-five years prior to its execution worked as farm hands on the testator's farm is irrelevant and incompetent to prove his testamentary capacity or undue influence exerted over him by two of his sons. *Maddox v. Maddox*, 734.
 4. **TESTAMENTARY CAPACITY—TEST OF.**—The competency or incompetency of a testator to engage in or understand any complicated matter or transaction in business is not a proper test of his mental capacity to execute a will. *Maddox v. Maddox*, 734.
 5. **TESTAMENTARY CAPACITY.**—A man may have mental capacity to make a will, and yet be incapable of making a contract or managing his his estate. *Maddox v. Maddox*, 734.
 6. **TESTAMENTARY CAPACITY.**—A testator, though aged and infirm, is not incapacitated from making his will, if he understands the business in which he is at the time engaged, and has mind and memory capable of presenting to him his property and the persons who are the natural objects of his bounty, and of understanding the distribution of his property as made by the will. *Maddox v. Maddox*, 734.
 7. **TESTATOR MAY MAKE AN UNREASONABLE, UNJUST, AND INJUDICIOUS** will, and it will still be valid if he is possessed of mental capacity and acts as a free agent at the time of its execution. *Maddox v. Maddox*, 734.
 8. **WILLS OBTAINED BY FRAUD OR UNDUE INFLUENCE IN THE FIRST INSTANCE ARE VOID**, and no subsequent ratification will render them valid without a formal re-execution or republication. *Haines v. Hayden*, 566.
 9. **UNDUE INFLUENCE—EVIDENCE OF SENILE DECAY—DECLARATIONS OF TESTATOR.**—If a will is attacked for undue influence in its execution, facts and circumstances, and declarations of the testator occurring subsequently to the execution of the will tending to show the state of his mind at the time it was executed, and the fact of undue influence, are not rendered incompetent or inadmissible by evidence showing that at the time of the execution of the will the testator was suffering from senile decay. *Haines v. Hayden*, 566.
 10. **UNDUE INFLUENCE—DECLARATIONS OF TESTATOR AS EVIDENCE.**—If a will is claimed to have been made under undue influence, declarations of the testator, both before and after its execution, may be given in evidence for the purpose of showing his state of mind. Subsequent declarations are admissible for the reason that the condition of mind ascertained at a date subsequent to the execution of the will may be presumed to have existed at a prior time. *Haines v. Hayden*, 566.
 11. **UNDUE INFLUENCE—DECLARATIONS OF TESTATOR AS EVIDENCE.**—If a will is attacked on the ground that it was executed under undue influence, declarations made by the testator subsequently to its execution are admissible in evidence to show that the influence exerted accomplished its improper purpose, and subjected the testator's will to that of the beneficiary, in the absence of such a change in the relation of the parties as renders such testimony inadmissible. In order to render such

- declarations admissible they need not have been made so near the date of the will as to be a part of the *res gestæ*, when the fair inference from all the circumstances is that they truly represent the testator's state of mind at the time the will was made. *Haines v. Hayden*, 566.
12. **UNDUE INFLUENCE—DECLARATIONS OF TESTATOR—EVIDENCE TO REBUT PRESUMPTION ARISING FROM NONDESTRUCTION OF WILL.**—Conditions and declarations of a testator subsequent to the execution of his will, and the continuous dominion over him of a person accused of exerting undue influence, are admissible in evidence for the purpose of weakening a presumption of the validity of the will to be drawn from its nondestruction during a period of ten years. *Haines v. Hayden*, 566.
13. **MENTAL INCOMPETENCY OF TESTATOR.**—Monomania amounting to insanity upon a single subject possessed by a testator, as evidenced by an unequal and unnatural disposition of his property made by him in his will, and such as must avoid it, is such an insane delusion as renders him incapable of reasoning on that particular subject, and shows that he assumed to believe to be true that which has no foundation or reason in fact. *Haines v. Hayden*, 566.
14. **UNDUE INFLUENCE—EVIDENCE.—FACTS AND CIRCUMSTANCES OCCURRING SUBSEQUENTLY** to the execution of a will, and relating to the condition of the testator's mind, and the question of fraud and undue influence claimed to have been exercised over him are admissible in evidence to prove, by inference or otherwise, that the same conditions existed before and at the time of its execution as existed afterwards on these points. *Haines v. Hayden*, 566.
15. **UNDUE INFLUENCE—RETAINING WILL WITHOUT DESTRUCTION.**—When a will is attacked on the ground of undue influence in its execution, and the party alleged to have exerted such influence relies upon a presumption of the validity of such will arising from its nondestruction during a period of ten years, and offers in evidence declarations of the testator that the will had been made by him and cannot be broken, together with directions to resist any attempt to break it, such presumption and the inference arising from such evidence may be met and overcome by evidence showing that such nondestruction as well as such declarations and directions were made while under the same delusion or dominion as existed or was exerted when the will was made. *Haines v. Hayden*, 566.
16. **UNDUE INFLUENCE.—WHEN A CONFIDENTIAL RELATION** is shown to exist between a testator and the recipient of his bounty, his influence is presumed to have induced the bequest, and the burden of proof is cast upon the beneficiary to explain the transaction and establish that it is reasonable. *Maddox v. Maddox*, 734.
17. **UNDUE INFLUENCE—EVIDENCE.**—Undue influence can seldom be proved by direct and positive evidence, and when extreme age and possible susceptibility to influence are shown in respect to a testator in the execution of his will, and an undue portion of the estate is granted to one to the exclusion or partial exclusion of another having equal or greater demands upon his bounty, every fact and circumstance surrounding the parties at the time of the execution of the will, and which bears upon it, will be examined with the utmost scrutiny to ascertain whether or not it was the product of fraud or undue influence. But the mere fact that unjust discrimination was made, coupled with the facts of old age and great debility of body, is not alone sufficient to raise a presump-

tion that undue influence was exerted by one who received the greater portion of the estate under the will. *Maddox v. Maddox*, 734.

18. **UNDUE INFLUENCE—PRESUMPTION.**—When a will is contested on the ground of undue influence exerted by its proponents over the testator, and they place themselves on the witness-stand and are subjected to cross-examination, no inference can be drawn against them from the fact that they offer no voluntary explanation of unequal and probably unnatural provisions in their favor as contained in the will. *Maddox v. Maddox*, 734.

19. **UNDUE INFLUENCE—BURDEN OF PROOF.**—If a testator and two of his sons, claimed to have been unduly favored in his will, lived on separate farms, and they never interfered in his business nor were they intrusted with its management or control, nor called upon for advice, though they visited him frequently, the burden of proof is upon the less favored sons who are contesting the will to prove that it was not voluntarily made by the testator, but was the product of the will of the proponents. *Maddox v. Maddox*, 734.

20. **UNDUE INFLUENCE—BURDEN OF PROOF.**—When a will is contested on the ground of undue influence exercised by its proponents toward the testator, the contestants must introduce some evidence from which undue influence may be inferred before the burden of proof is shifted to the proponents to explain unequal or unnatural provisions in the will. *Maddox v. Maddox*, 734.

21. **UNDUE INFLUENCE—BURDEN OF PROOF.**—When a will is contested on the ground of want of mental capacity in the testator and of undue influence exercised over him, the burden of proof is on the proponents of the will to prove its proper execution and attestation, and also that the testator was of proper age and sound mind. When these facts are shown, a will *prima facie* valid is established, and it then devolves upon the contestants to prove fraud or undue influence. *Maddox v. Maddox*, 734.

22. **REPUBLICATION—EFFECT OF.**—A republished will must be construed to speak at the date of the republication. *Gilmor's Estate*, 855.

23. **REPUBLICATION BY CODICIL—INTERLINEATIONS—PRESUMPTION.**—A codicil operates as a republication of the original will so as to make it speak as of the date of the codicil; and if any interlineations appear therein in the handwriting of the testator, the presumption is that they were made at or before the execution of the codicil. *Gilmor's Estate*, 855.

24. **CONSTRUCTION — REPUBLICATION—INTERLINEATIONS — SUBSTITUTION.**—When at the time of the republication of a will the testator adds the words "or to their heirs" after the words "as follows" in the clause in the original will reading "I give and bequeath as follows," followed by the names of the legatees, and then adds the word "deceased" after the name of each legatee then dead, it is clear that these words are intended to apply to the respective legatees if alive, and to their heirs if they be dead, and they will be construed as words of substitution, and not as words of limitation. *Gilmor's Estate*, 855.

25. **REPUBLICATION — INTERLINEATIONS—SUBSTITUTION—EVIDENCE.**—It is competent for the purpose of ascertaining the intention of the testator to show by extrinsic evidence that at the time of the republication of his will the words "or to his heirs" were added as applying to all of the legatees, and that the word "deceased" was added after the name of

- each legatee then dead, and the circumstances under which they were so added. Such evidence clearly shows that the testator intended the words "or to their heirs" as words of substitution, and the word "deceased" to indicate that the legatees then dead were not to receive the legacies, but that they should go to their heirs. *Gilmor's Estate*, 855.
26. **ERASURES—PROOF OF EXECUTION.**—When a will duly executed is not regularly republished or re-executed after erasures therein have been made, and there is but one witness to the fact of the erasures being made by authority of the testator, the will with the erasures in it cannot stand as his will for lack of statutory proof of two attesting witnesses to its execution in that form, and when such will in its original state without the erasures is duly proved by two subscribing witnesses, it is in that form the last will of the testator, and as such must be admitted to probate. *Simrell's Estate*, 864.
27. **CONSTRUCTION—"AND"—"OR."**—Courts will transpose the clauses of a will, and construe "or" to be "and" and "and" to be "or" only when absolutely necessary to do so in order to support the evident meaning of the testator. *Gilmor's Estate*, 855.
28. **WILL OF MARRIED WOMAN—REVOCATION BY MARRIAGE.**—The marriage of a woman does not revoke a will made by her while a *feme sole* in a state where the statute provides that property acquired or owned by a married woman both before and after marriage "by purchase, gift, grant, devise, bequest, descent, or in course of distribution or in any other manner, she shall hold for her separate use, with power of devising the same as fully as if she were a *feme sole*." Such legislation removes every common law disability to which a *feme covert* was formerly subjected with respect to making a valid will. *Roane v. Hollingshead*, 438.
29. **REVOCATION OF, BY DIVORCE.**—When, at the time that a decree of divorce is granted the parties to the action have settled their property rights by mutual agreement in writing, without mentioning mutual wills made by them ten years before by which each devised to the other all of his or her property, the decree of divorce and settlement constitute an implied revocation of the wills. *Lansing v. Haynes*, 545.
- See **BEQUEST**; **EVIDENCE**, 10; **HOMESTEAD**, 3; **HUSBAND AND WIFE**, 10; **INSURANCE**, 12; **TRUSTS**, 4, 5, 9, 10, 12.

WITNESSES.

1. **ONE WHO CLAIMS PROPERTY UNDER AN ALLEGED GIFT FROM A DECEDENT** is competent to testify as a witness in an action to recover it, from one who is administrator of the decedent but is not sued in his representative capacity. *Goulding v. Horbury*, 357.
2. **EXPERT EVIDENCE—OPINION OF PHYSICIAN.**—In an action to recover for personal injury, the opinion of a medical expert as to whether or not the condition of plaintiff's arm as alleged might co-exist with his ability to use it in the manner witnessed by the jury is admissible. *Graves v. Battle Creek*, 561.
3. **INCREASE OF RISK—EVIDENCE.**—As bearing on the question whether the use of a naphtha torch to burn off old paint would increase a risk, evidence of experts is admissible to show that the rate of premium for fire insurance is greater where such a torch is to be used for such a purpose than if there is to be no such use. *First Congregational Church v. Holyoke etc. Ins. Co.*, 508.

4. **EVIDENCE OF EXPERT** CONSISTING of his opinion in reference to the actual effect of the use of a naphtha torch in reference to the danger from fire is incompetent. *First Congregational Church v. Holyoke etc. Ins. Co.*, 508.
6. **INCREASE OF RISK.**—**EVIDENCE OF EXPERTS** in regard to proper or usual way of removing old paint from a building for the purpose of repainting it is admissible. *First Congregational Church v. Holyoke etc. Ins. Co.*, 508.
See **COSTS**, 1; **DAMAGES**, 2; **EVIDENCE**; **TRIAL**, 5; **WILLS**, 2.

WRITS.

See **COURTS**, 2.

WORDS AND PHRASES.

See **DEFINITIONS**; **MAXIMS**.

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